FILED
071043 FEB 11 2008
OFFICE OF THE CLERK

No. _____-_____

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

ANTHONY HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County

MARK RYAN DWYER
DAVID M. COHN*
Assistant District Attorneys

New York County
District Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9000

* *Counsel of Record for the Petitioner*

FEBRUARY 11, 2008

QUESTIONS PRESENTED

1. Under *Santobello v. New York*, 404 U.S. 257 (1971), is specific performance an appropriate remedy for the plea court's failure to inform a defendant that he will be required to serve a period of post-release supervision following his release from prison?

2. Does the "harmless error" doctrine apply to the plea court's failure to inform a defendant that he will be required to serve a period of post-release supervision?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THIS COURT'S LONGSTANDING DECISION IN *SANTOBELLO V. NEW YORK* 6

2. THE DECISION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THE HOLDINGS OF EVERY FEDERAL CIRCUIT TO ADDRESS THE ISSUE 9

3. THIS CASE PRESENTS A FEDERAL QUESTION 15

CONCLUSION 18

TABLE OF CONTENTS (continued)

APPENDIX (separate volume)

Opinion of the New York Court of Appeals.....1a

Opinion of the New York Appellate Divsion.....10a

Opinion of the New York Supreme Court 41a

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Evans, 514 U.S. 1 (1995) 15

Aviles v. United States, 405 F. Supp. 1374 (S.D.N.Y. 1975) 11

Barker v. Wingo, 407 U.S. 514 (1972) 16

Boykin v. Alabama, 395 U.S. 238 (1969) 16

Brady v. United States, 397 U.S. 742 (1970) 14

Duke v. Cockrell, 292 F.3d 414 (5th Cir. 2002) 14

Earley v. Murray, 451 F.3d 71 (2d Cir. 2006) 3

Kazmirski v. Poole, 2005 U.S. Dist. Lexis 36337 (N.D.N.Y. 2005) 11

McCarthy v. United States, 394 U.S. 459 (1969) 16

Michigan v. Long, 463 U.S. 1032 (1983) 15

Moore v. United States, 592 F.2d 753 (4th Cir. 1979) 11

North Carolina v. Alford, 400 U.S. 25 (1970) 16

Paradiso v. United States, 689 F.2d 28 (2d Cir. 1982) 9, 11

Parry v. Rosemeyer, 64 F.3d 110 (3d Cir. 1995) 14

Pennsylvania v. Labron, 518 U.S. 938 (1996) 15

Sanchez v. United States, 572 F.2d 210 (9th Cir. 1977) 14

Santobello v. New York, 404 U.S. 257 (1971) ..... i, 6-8, 14, 17

United States v. Alber, 56 F.3d 1106 (9th Cir. 1995) 10

United States v. Clay, 925 F.2d 299 (9th Cir. 1991) 10

United States v. Garcia, 983 F.2d 625 (5th Cir. 1993) 10

United States v. Good, 25 F.3d 218 (4th Cir. 1994) 10

United States v. Powell, 269 F.3d 175 (3d Cir. 2001) 12-13

United States v. Raineri, 42 F.3d 36 (1st Cir. 1994) 12-13

United States v. Rodrigue, 545 F.2d 75 (8th Cir. 1976) 11

United States v. Saenz, 969 F.2d 294 (7th Cir. 1992) 10

United States v. Whyte, 3 F.3d 129 (5th Cir. 1993) 12

United v. Andrades, 169 F.3d 131 (2d Cir. 1999) 10

Warren v. Richland County Circuit Court, 223 F.3d 454 (7th Cir. 2000) 14

STATE CASES

People v. Adams, 13 A.D.3d 76, 785 N.Y.S.2d 331 (N.Y. App. Div. 2004) 3

People v. Hill, 9 N.Y.3d 189, 849 N.Y.S.2d 13 (N.Y. 2007) 1

People v. Cataldo, 39 N.Y.2d 578, 384 N.Y.S.2d 763 (1976) 9

People v. Catu, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005) 16

People v. Ford, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995) 16

People v. Gina M.M., 40 N.Y.2d 595, 388 N.Y.S.2d 899 (1976) 16

People v. Harris, 61 N.Y.2d 9, 471 N.Y.S.2d 61 (1983) 16

People v. Van Deusen, 7 N.Y.3d 744 (2006) 17

People v. Williams, 44 A.D.3d 335, 843 N.Y.S.2d 561 (N.Y. App. Div. 2007) 3

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. 14. 2

28 U.S.C. § 1257 2

STATE STATUTES

N.Y. Crim. Proc. Law § 440.10 3

N.Y. Penal Law § 70.45 ..... 3, 5, 13

In The
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-versus-

ANTHONY HILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The State of New York respectfully petitions for a writ of *certiorari* to the New York Court of Appeals in *People v. Anthony Hill*, 9 N.Y.3d 189, 849 N.Y.S.2d 13 (N.Y. 2007).

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 9 N.Y.3d 189, 849 N.Y.S.2d 13 (N.Y. 2007), and is reproduced in the appendix at pages 1a-9a. The opinion of the New York Appellate Division, First Department, is reported at 39 A.D.3d 1, 830 N.Y.S.2d 33 (N.Y. App. Div. 2007), and is reproduced in the appendix at pages 10a-40a. The opinion of the trial court (New York Supreme Court, County of New York) is reproduced in the appendix at pages 41a-46a.

STATEMENT OF JURISDICTION

The New York Court of Appeals issued its opinion reversing the judgment on November 15, 2007. (App. 1a).[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Respondent Anthony Hill was charged in a 32-count indictment with raping, sodomizing, and sexually abusing his daughter. (App. 6a, 10a, 41-42a). In the midst of trial, following his daughter's direct examination testimony, respondent pleaded guilty to one count of first-degree rape, i. full satisfaction of the indictment. (App. 1a, 6a, 10a-11a, 42a). In exchange for his plea, respondent was promised a sentence of 15 years in prison. (*See* App. 1a, 6a, 11a, 42a). The court imposed a prison sentence of 15 years. (App. 1a, 6a, 11a, 42a). The court did not inform respondent that, pursuant to New York law, he was required to serve a period of

---

[1] Page references preceded by "App." are to petitioner's separately-bound appendix.

post-release supervision ("PRS") following his release from prison. (App. 1a, 6a, 11a, 42a).[2]

Approximately two years later, respondent filed a post-judgment motion to vacate his conviction, pursuant to section 440.10 of the New York Criminal Procedure Law. Respondent alleged that his plea was involuntary, because he had not been informed of the PRS requirement. (App. 6a, 11a, 42a-43a). While recognizing that respondent had not been informed about PRS, the trial court declined to vacate his plea. Instead, to afford respondent the benefit of his original bargain, the court resentenced respondent to 12 ½ years in

---

[2] As a first-time violent felon convicted of a class B violent felony, respondent was required to serve a PRS term of at least 2 ½ years and not more than 5 years. *See* N.Y. Penal Law § 70.45(2)(f). Under the law as it stood at the time of respondent's original sentence, a 5-year PRS period applied automatically if the judge did not specify a shorter period. *See People v. Adams*, 13 A.D.3d 76, 785 N.Y.S.2d 331 (N.Y. App. Div. 2004) ("the statutory period of supervision . . . is automatically five years . . . unless the court specifies a shorter period"). More recent precedents of the Appellate Division, First Department, hold that, where the trial court has discretion to set the length of the PRS term, it must pronounce the PRS term at the sentencing hearing and enter it on the record. *See, e.g., People v. Williams*, 44 A.D.3d 335, 843 N.Y.S.2d 561 (N.Y. App. Div. 2007) (remanding for trial judge to set length of PRS term); *cf. Earley v Murray*, 451 F.3d 71, 74-77 (2d Cir. 2006) (holding that due process required trial judge to pronounce sentence), *reh'g denied*, 462 F.3d 147 (2006), *cert. denied*, 127 S. Ct. 3014 (2007).

prison, to be followed by 2 ½ years of PRS. (App. 4a-5a, 11a, 44a-46a).

On appeal, the New York Appellate Division, First Department, affirmed respondent's conviction, by a vote of three to two. The Appellate Division held that respondent suffered no prejudice from the plea court's failure to inform him of PRS, because his ultimate sentence comported with his reasonable expectations. (App. 32a-37a). The two dissenting justices opined that, even though the trial court's remedy was "sensible," recent precedents of the New York Court of Appeals dictated that respondent's guilty plea was void from the outset. (App. 37a-40a).

The New York Court of Appeals reversed, by a vote of four to three. (App. 1a-9a). The majority held that when a defendant is not informed of a "direct consequence" of a guilty plea, the plea "cannot be deemed knowing, voluntary, and intelligent." (App. 2a). The court continued that the "constitutional defect lies in the plea itself and not in the resulting sentence." (App. 2a). Hence, the court concluded, "vacatur of the plea" is the only appropriate remedy, because it "returns a defendant to his or her status before the constitutional infirmity occurred." (App. 2a-3a).

The majority stated further that "harmless error analysis" does not apply to the plea court's failure to inform a defendant of a PRS term. (App. 4a). Instead, the majority ruled that the plea was void from the outset. The court explained:

> Here, at the time of his plea, defendant was not informed that a period of postrelease supervision would follow his term of incarceration. Thus, defendant did not possess the requisite information knowingly to waive his rights and must be permitted to withdraw his plea. That the trial court ultimately resentenced defendant to a total period of incarceration (12 ½ years) plus postrelease supervision (2 ½ years) equal to his originally promised sentence of incarceration does not change this conclusion.

(App. 4a-5a).[3]

In dissent, three judges argued that respondent's guilty plea need not be vacated,

---

[3] In a footnote, the court observed that respondent might face "more incarceration" under the new sentence than promised, because if he violated PRS near the end of his term of supervision, he could receive "an additional six months' incarceration beyond the term of postrelease supervision." (App. 5a n. 2) (*citing* N.Y. Penal Law § 70.45(5)).

because he received the "full benefit of his bargain." (App. 8a). In fact, he received a "windfall," because he initially expected to serve 15 full years in prison. (App. 8a). Additionally, the dissent observed that the trial court had "good reason to choose the remedy of specific performance over vacatur of the plea," because the prosecution would be "severely prejudiced" if the victim, respondent's daughter, "was subjected to testifying once again at a new trial after several years have passed." (App. 8a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THIS COURT'S LONGSTANDING DECISION IN *SANTOBELLO V. NEW YORK.*

To begin, the decision of New York Court of Appeals conflicts with the longstanding rule of *Santobello v. New York*, 404 U.S. 257 (1971).

The pertinent facts are beyond dispute. At the plea hearing, the court failed to inform respondent of the PRS requirement. The trial court attempted to cure that error by modifying respondent's sentence to comport with his reasonable expectations under the bargain. In that regard, the trial court modified respondent's sentence to 12 ½ years in prison and 2 ½ years of PRS, to comport with respondent's expectation that he would serve no more than 15 years in state custody. The New York Court of Appeals held,

however, that respondent's guilty plea was void from the outset, and thus due process required its vacatur.

As *Santobello* makes clear, the New York Court of Appeals wrongly concluded that the sole permissible remedy was vacatur of respondent's guilty plea. In *Santobello*, the prosecutor promised the defendant, in exchange for his guilty plea, that the state would make no recommendation regarding the sentence. However, a new prosecutor who was later assigned to the case violated that promise, recommending that the defendant receive the maximum sentence. *See Santobello*, 404 U.S. at 258-59. On appeal, the defendant contended that he should have been permitted to withdraw his guilty plea. *See id.* at 263. He argued that, when a promise made in exchange for a guilty plea is broken, that "undercuts the basis for the waiver of constitutional rights implicit in the plea." *See id.* at 268 (Marshall, J., dissenting).

While finding that the broken promise represented constitutional error, this Court rejected the defendant's claim that his plea must be vacated. Instead, this Court held that the state court had discretion to determine whether the circumstances warranted "only that there be specific performance of the agreement on the plea, in which case [the defendant] should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by [the defendant], *i.e.*, the opportunity to withdraw his plea of guilty." *Santobello*, 404 U.S. at 263. Hence,

this Court held that a plea induced by an unfulfilled promise is not void from the outset. Instead, the validity of the plea turns on whether the promise is ultimately performed.

Applying *Santobello* to the present case, the state court had two options. First, it could grant respondent the remedy he sought: vacatur of his guilty plea. Alternatively, it could grant respondent the benefit of his bargain: that he would serve a total of 15 years, and no more, in state custody. The trial court chose the second option, reducing respondent's 15-year prison sentence to 12 ½ years, to be followed by 2 ½ years of PRS. The new sentence granted respondent the benefit of his bargain. In fact, it granted him a windfall, since he would now serve the final 2 ½ years under the less restrictive custody of post-release supervision. Additionally, the trial court's remedy served the interest of justice, because the prosecution and the victim would suffer hardship from a new trial years after the crime.

Contrary to the holding of the New York Court of Appeals, the defect in the plea colloquy *could* be cured, and harmless error analysis *did* apply. The guilty plea was not void, so long as respondent ultimately received the benefit of his plea bargain.

To be sure, the state court could have decided, in its discretion, that withdrawal of the plea was the most appropriate remedy under the circumstances. But the Court of Appeals made no such finding. The

lower state courts, which considered that question, found that justice was better served by a modification of respondent's sentence. The Court of Appeals did not dispute that conclusion, holding instead that vacatur of respondent's guilty plea was the only permissible remedy. That holding was plain error.[4]

2. THE DECISION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THE HOLDINGS OF EVERY FEDERAL CIRCUIT TO ADDRESS THE ISSUE.

Additionally, the decision of the New York Court of Appeals conflicts with the holdings of every federal appellate court to address the issue. Federal courts have found harmless the failure to inform a

---

[4] In the post-conviction proceedings, respondent testified that he preferred to serve the final 2 ½ years in prison instead of under PRS. The trial court did not credit respondent's testimony, finding it "disingenuous." (App. 46a). In any event, even if the state court had credited respondent's assertion, it would not have been dispositive. A defendant is entitled to have only his *reasonable* expectations under a plea agreement fulfilled, not his subjective preferences. *See Paradiso v. United States*, 689 F.2d 28, 31 (2d Cir. 1982) ("In determining what is reasonably due a defendant the dispositive question . . . is what the parties to this plea agreement reasonably understood to be the terms of the agreement") (internal quotations omitted); *People v. Cataldo*, 39 N.Y.2d 578, 580, 384 N.Y.S.2d 763, 763-64 (1976) ("[c]ompliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation").

defendant about a term of supervised release (the federal analog to PRS), so long as the combined prison sentence and supervised release term do not exceed the total amount of time that the defendant knew he could spend in prison. *See, e.g., United States v. Alber*, 56 F.3d 1106, 1109-10 (9th Cir. 1995) (upholding guilty plea: defendant was informed that he could receive a prison sentence of up to 25 years, and the prison and supervised release terms imposed by the court totaled only 11 years); *United States v. Good*, 25 F.3d 218, 220-21 (4th Cir. 1994) (failure to advise about supervised release is "harmless error if the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive"); *United States v. Garcia*, 983 F.2d 625, 628 (5th Cir. 1993) (failure to advise of supervised release harmless if "the sentence actually imposed cannot restrict the defendant's liberty for a period exceeding the statutory maximum as advised"); *United States v. Saenz*, 969 F.2d 294, 297 (7th Cir. 1992) (reversal not required for failure to inform defendant of supervised release unless the "term of supervised release plus the prison term . . . exceeds the maximum prison term of which the defendant was advised"); *United States v. Clay*, 925 F.2d 299, 303 (9th Cir. 1991) (if defendant "knew before pleading guilty that he could be sentenced to a term as long as the one he eventually received, then the failure to inform him of the supervised release term did not affect his substantial rights"); *see also United v. Andrades*, 169 F.3d 131, 134 (2d Cir. 1999) (holding, as a general rule, "that the error is harmless where the district court misinforms a

defendant of the applicable supervised release term and the total sentence of imprisonment and supervised release actually imposed is less than that described during the plea allocution").

Federal courts have ruled similarly in cases involving probationary sentences and special parole terms. *See Paradiso, supra,* 689 F.2d at 30-31 (upholding plea where defendant was promised an aggregate prison term of no more than 10 years and received a sentence of 8 years in prison consecutive to 2 years of probation); *Moore v. United States,* 592 F.2d 753, 756 (4th Cir. 1979) (where defendant was told that he faced 15 years in prison and was not informed of 3-year special parole term, an appropriate remedy would be reduction of prison sentence to 12 years, to be followed by 3 years of special parole); *United States v. Rodrigue,* 545 F.2d 75, 76 (8th Cir. 1976) (failure to advise defendant of special parole term harmless); *Aviles v. United States,* 405 F. Supp. 1374, 1377-83 (S.D.N.Y. 1975) (same), *aff'd,* 538 F.2d 307 (2d Cir. 1976).

In fact, applying those well settled federal precedents, a federal habeas court applied the harmless error doctrine in a case from New York, in which, like here, the defendant was not informed of PRS. *See Kazmirski v. Poole,* 2005 U.S. Dist. Lexis 36337, *4 (N.D.N.Y. 2005) (unpublished opinion) (denying habeas corpus relief where the "petitioner's sentence and post-release supervision time do not exceed the maximum sentence of which he was aware").

This is not to say that even egregious errors in a plea colloquy are always harmless. In that regard, a defendant who pleads guilty without a specific promise regarding his sentence, and who is badly misinformed about the applicable range, might not be deemed to have entered a valid plea. *See United States v. Whyte*, 3 F.3d 129 (5th Cir. 1993) (applying Fed. R. Crim. P. 11: error not harmless where, contrary to court's statement at plea hearing, defendant was subject to a mandatory term of 10 years, not 5, a possible maximum term of life, not 20 years, a supervised release term of 5 years, not 4, and a fine of $4 million, not $2 million); *United States v. Raineri*, 42 F.3d 36, 42 (1st Cir. 1994) (speculating that a defendant might suffer prejudice if misinformed about the applicable range). One might even imagine a rare defendant who could reasonably prefer imprisonment to supervised release. *See United States v. Powell*, 269 F.3d 175, 186 (3d Cir. 2001) (speculating that a defendant with a "history of addiction" might reasonably believe that "extended incarceration provides a better chance of rehabilitation" than supervised release).

But none of those concerns apply here. The plea court's error here was not egregious (in contrast to *Whyte*), and the hypothetical scenarios imagined in *Powell* and *Raineri* did not occur here. In fact, despite their hypothetical musings, *Powell* and *Raineri* rejected the defendants' claims that their guilty pleas had to be vacated, even though neither defendant was correctly informed about supervised release. *See Powell*, 269 F.3d at 185-87; *Raineri*, 42

F.3d at 41-42. As the *Powell* and *Raineri* courts acknowledged, no federal circuit has invalidated a plea under the circumstances present in the case at hand. *See Powell*, 269 F.3d at 180-81 ("Every circuit court of appeals that has considered a case involving a defendant who is misinformed as to the maximum term of supervised release, but who receives a sentence with a combined term of imprisonment and supervised release that is less than the maximum possible penalty has concluded that the misinformation constituted harmless error"); *Raineri*, 42 F.3d at 42 ("Courts have commonly held" that the failure to inform a defendant of supervised release is "harmless when the defendant receives a combined sentence of imprisonment and supervised release that is less than the maximum term of imprisonment earlier described").

Hence, the decision of the New York Court of Appeals here, that respondent's guilty plea was void from the outset and that harmless error analysis did not apply, conflicts with the holdings of every federal appellate case on point.

Notably, no alternate ground exists for the decision of the New York Court of Appeals. To be sure, the court observed in a footnote that, if respondent were to violate his PRS near the end of the supervision period, he could be returned to jail for up to six months beyond the promised 15-year sentence. (App. 5a n. 2); *see* N.Y. Penal Law § 70.45(5)(d)(iv). However, that observation was merely an aside and did not form part of the court's holding. As discussed, the court held that

respondent's guilty plea was void from the outset, regardless of the "resulting sentence." (*See* App. 2a).

Moreover, the possibility that respondent might be subject to six extra months in custody if he violates his PRS does not render his guilty plea invalid. To be sure, a defendant must be informed of all direct consequences of his guilty plea. *See Brady v. United States*, 397 U.S. 742, 755 (1970). However, consequences within a defendant's control do not qualify as "direct." Therefore, as federal courts have uniformly held, revocation of parole, probation, or other supervision -- which derives from an independent, voluntary act by the defendant -- is merely a collateral consequence of the original guilty plea. *See, e.g., Duke v. Cockrell, 292 F.3d 414, 417* (5th Cir. 2002) (possibility that defendant's probation could be revoked was collateral consequence: "the ability to abide by the probation conditions was within [defendant's] control"); *Warren v. Richland County Circuit Court*, 223 F.3d 454, 457-58 (7th Cir. 2000) (revocation of probation was collateral consequence); *Parry v. Rosemeyer*, 64 F.3d 110, 114 (3d Cir. 1995) (same: "revocation of probation is not an immediate and automatic consequence of pleading guilty"); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977) (revocation of parole was collateral consequence).

In short, the decision of the New York Court of Appeals conflicts not only with *Santobello* but with every federal appellate decision on point. This Court should grant *certiorari* to resolve that conflict.

3. THIS CASE PRESENTS A FEDERAL QUESTION.

Finally, this case presents a federal question. This Court may review a state court decision that "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Under those circumstances, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. Even if a state court's decision relies on its own opinions or "jurisprudence," it is "interwoven" with federal law if the cited state cases analyze federal principles. *See Pennsylvania v. Labron*, 518 U.S. 938 (1996). A state court will not be deemed to have invoked an independent and adequate state ground unless it offered a "plain statement that its references to federal law" were only for the purpose of "'guidance.'" *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (quoting *Long*, 463 U.S. at 1041).

Here, the state court decision presents a federal question, because it intertwined federal and state constitutional principles. In that regard, the New York Court of Appeals based its decision on "due process" (App. 1a, 5a) and described the error as a "constitutional" defect (App. 2a, 3a, 5a). Critically, the court did not address separate federal and state constitutional principles. In fact, near the beginning of its opinion, the Court of Appeals cited a

precedent of this Court, *McCarthy v. United States*, 394 U.S. 459, 466 (1969), alongside a reference to the New York constitution. (*See* App. 2a). That pairing signaled that New York and federal due process rules regarding plea bargaining are coextensive.

The state cases on which the Court of Appeals relied were grounded in this Court's constitutional precedents. For instance, the Court of Appeals cited *People v. Ford*, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995), which invoked, among other precedents, *Boykin v. Alabama*, 395 U.S. 238 (1969), and *North Carolina v. Alford*, 400 U.S. 25 (1970). The court also cited *People v. Harris*, 61 N.Y.2d 9, 471 N.Y.S.2d 61 (1983), which relied on several federal cases, including *McCarthy*, *Boykin*, and *Barker v. Wingo*, 407 U.S. 514 (1972). Further, the court cited *People v. Gina M.M.*, 40 N.Y.2d 595, 388 N.Y.S.2d 899 (1976), which similarly relied on several federal cases, including *Boykin*.

Additionally, the Court of Appeals relied extensively on *People v. Catu*, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005), and its progeny. (*See* App. 2a-5a). *Catu*, in turn, relied primarily on *Ford*, *supra*, *see Catu*, 4 N.Y.3d at 244-45, 792 N.Y.S.2d at 887-88, which was grounded in this Court's constitutional precedents. As noted, the Court of Appeals also cited *Ford* here.

In short, the New York Court of Appeals based its ruling, both directly and indirectly, on federal constitutional precedents. Therefore,

because the decision of the Court of Appeals intertwined federal and state law, it presents a federal question.

* * *

In sum, the decision of the New York Court of Appeals is contrary to the longstanding rule of *Santobello*. In addition, it conflicts with the holdings of every federal appellate court to address the issue. Accordingly, this Court should grant *certiorari* to resolve the split between the New York and federal courts. In fact, this case would be appropriate for summary reversal, because the decision of the New York Court of Appeals ignores settled federal constitutional precedent.[5]

[5] Notably, the New York Court of Appeals vacated a guilty plea on the same erroneous ground in another recent case. *See People v. Van Deusen*, 7 N.Y.3d 744, 745-46 (2006) (holding that guilty plea was involuntary where defendant was promised a sentence of no more than 15 years in prison and received 8 years in prison and 5 years of PRS).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

MARK RYAN DWYER
DAVID M. COHN*
Assistant District Attorneys
Of Counsel

*Counsel of Record for Petitioner

February 11, 2008

Supreme Court, U.S.
FILED
(2)
07-1043 FEB 11 2008
OFFICE OF THE CLERK

No. _____ - _____

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

ANTHONY HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County

MARK RYAN DWYER
DAVID M. COHN*
Assistant District Attorneys

New York County
District Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9000

* *Counsel of Record for the Petitioner*

FEBRUARY 11, 2008

TABLE OF CONTENTS

Page

Opinion of the New York Court of Appeals.....1a

Opinion of the New York Appellate Division.....10a

Opinion of the New York Supreme Court.....41a

==========

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 144

The People of the State of New York,
Respondent,

v.

Anthony Hill,
Appellant.

Barbara Zolot, for appellant.
David M. Cohn, for respondent.

KAYE, Chief Judge:

In April 2002, defendant pleaded guilty to rape in the first degree in full satisfaction of the indictment. The court sentenced him to a determinate 15-year imprisonment term. No mention was made, either during the plea or during the sentencing that followed one month later, of an additional five-year term of postrelease supervision, which defendant allegedly learned of from a fellow inmate. Defendant now claims that he would not have agreed to the plea had he known of the postrelease supervision, and he seeks vacatur of the plea.

As has been well established in our law, when a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the waiver be knowing, voluntary and

intelligent (see NY Const, art I, § 6; People v Ford, 86 NY2d 397, 403 [1995]; see also McCarthy v United States, 394 US 459, 466 [1969] ["if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"]). Prior to accepting a guilty plea, therefore, a defendant must be informed of the direct consequences of the plea. When a court fails to so advise the defendant, the plea cannot be deemed knowing, voluntary and intelligent, and defendant may withdraw the plea and be returned to his or her uncertain status before the negotiated bargain (see People v Harris, 61 NY2d 9, 17 [1983]; People v Gina M. M., 40 NY2d 595 [1976]).

Among the direct consequences of pleading guilty is the period of postrelease supervision that follows a determinate sentence of incarceration. As we explained in People v Catu (4 NY3d 242, 245 [2005]), "[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction." In that the constitutional defect lies in the plea itself and not in the resulting sentence, vacatur of the plea is the remedy for a Catu error since it returns a defendant

to his or her status before the constitutional infirmity occurred.[1]

In People v Van Deusen (7 NY3d 744 [2006]), defendant pleaded guilty, and the trial court promised a determinate sentencing range of between five to fifteen years of incarceration with no mention of the postrelease supervision term. On the eve of sentencing, defendant moved to withdraw her guilty plea based on the trial court's failure to inform her of postrelease supervision. The court denied her motion and sentenced defendant to a determinate term of eight years of imprisonment with five years of postrelease supervision. This Court rejected the Appellate Division's rationale that vacatur of a guilty plea was not required when the sentencing court gave the defendant the benefit of her plea bargain, exposing her to a shorter total period of punishment. We held that: "At the time defendant pleaded guilty, she did not possess all the

---

[1] People v Selikoff (35 NY2d 227 [1974]) does not warrant a different result (dissenting op at 2). There, the court, at sentencing, refused to fulfill the promised sentence because the court had learned, between the plea and the sentencing date, that defendant was the principal and not merely a pawn in a fraudulent scheme. Defendant never challenged the voluntariness of his plea and refused to withdraw it. When, at the time of a plea, a defendant possesses the requisite information to make an informed choice, the defendant's guilty plea is voluntary, so either the plea's vacatur or specific performance of the promise is appropriate. A Catu error, by contrast, affects the voluntariness of defendant's guilty plea, and thus makes vacatur the appropriate remedy.

information necessary for an informed choice among different possible courses of action because she was not told that she would be subject to mandatory postrelease supervision as a consequence of her guilty plea. Accordingly, defendant's decision to plead guilty cannot be said to have been knowing, voluntary and intelligent" (id. at 746). In effect, the Court rejected harmless error analysis by requiring vacatur of defendant's guilty plea (see also People v Goss, 286 AD2d 180, 184 [3d Dept 2001] ["as defendant never knowingly agreed to the five-year postrelease period of supervision to follow his 12-year determinate sentence, we reject the People's argument that the error in not disclosing this portion of the sentence to defendant is harmless"]).

Similarly, in People v Louree (8 NY3d 541, 545 [2007]), we held it "irrelevant that the prison sentence added to postrelease supervision is within the range of prison time promised at the allocution." Harmless error doctrine is inapposite when analyzing remedies for Catu errors (see People v Coles, 62 NY2d 908, 910 [1984] ["harmless error rules were designed to review trial verdicts and are difficult to apply to guilty pleas"]).

Here, at the time of his plea, defendant was not informed that a period of postrelease supervision would follow his term of incarceration. Thus, defendant did not possess the requisite information knowingly to waive his rights and must be permitted to withdraw his plea. That the trial court ultimately resentenced defendant to a total period of incarceration (12 1/2 years) plus postrelease

supervision (2 1/2 years) equal to his originally promised sentence of incarceration does not change this conclusion.[2]

The dissent incorrectly believes that Catu and Van Deusen turned on the question whether "the defendant got the full benefit of her plea bargain" (dissenting op at 3); thus, the dissent attempts to undo the prejudice of defendant's involuntary guilty plea. Rather, Catu, Van Deusen and Louree made clear that the courts violated the defendant's due process rights -- not the defendant's sentencing expectations. Therefore, we vacated the defendants' involuntary guilty pleas to remedy the constitutional violations. Here, we are constrained to give the same relief, exposing defendant to the full penalty of at least a 25-year prison term.

Accordingly, the order of the Appellate Division should be reversed, defendant's plea vacated and the case remitted to Supreme Court for further proceedings on the indictment.

---

[2] Defendant urges that, despite the mathematics, the sentence -- because it adds postrelease supervision to incarceration -- is not in any event equivalent to the promised sentence. Moreover, he could, in fact, face more incarceration under the new sentence than under the agreed-to sentence. If he violated the postrelease supervision conditions within six months of the postrelease supervision term's end, he could receive an additional six months' incarceration beyond the term of postrelease supervision (see Penal Law § 70.45 [5]).

PIGOTT, J.(dissenting) :

I respectfully dissent and would affirm the order of the Appellate Division. A grand jury charged defendant in a 32-count indictment with raping, sodomizing, and sexually abusing his daughter. A jury trial commenced on April 22, 2002, at which defendant's daughter, then sixteen, was the first to testify. She recounted for the jury in detail over several hours how defendant raped and abused her over a six-year period, beginning in 1994, when she was nine years old. Following the daughter's direct-examination testimony, defendant informed the court that he wished to plead guilty to the top count of the indictment, first-degree rape, in full satisfaction of the charges. Defendant admitted that his daughter's direct-examination testimony was true, and specifically, that he had forced her to have sex with him since she was nine years old. The court accepted defendant's plea and informed him that he would serve a prison sentence of 15 years. It is undisputed that no mention was made of any mandatory post-release supervision. At sentencing, the court imposed the negotiated 15-year prison sentence.

In March 2004, approximately two years later, defendant challenged his judgment of conviction, arguing that his plea was involuntary because he had not been informed that his prison sentence carried a five-year period of post-release supervision. Following proceedings before Supreme Court, defendant's sentence was modified to a term of 12 1/2 years in prison and two and one-half years of

post-release supervision. The Appellate Division, with two Justices dissenting, affirmed defendant's modified sentence.

This Court has consistently held that a court's "failure or inability to fulfill a [sentencing] promise requires either that the plea of guilty be vacated or the promise fulfilled, but there is no indicated preference for one course over the other. The choice rests in the discretion of the sentencing court" (People v Selikoff, 35 NY2d 227, 239 [1974], cert. denied, 419 US 1122 [1975]). Indeed, a trial court may have good reason to choose specific performance over a defendant's request to withdraw his plea. For instance, when years have passed since the original plea, making it difficult for the People to proceed to trial, allowing vacatur of the plea would afford the defendant "more than he [is] entitled" (id. at 240). For that reason, "the State can hold a defendant to an agreed sentence rather than allow vacat[ur] of the plea when it would otherwise be prejudiced" (People v McConnell, 49 NY2d 340, 349 [1980]; see People v Esposito, 32 NY2d 921, 923 [1973]).

Contrary to the majority's position, I find nothing in our prior precedent that requires a vacatur of defendant's plea as the only possible remedy for the Catu error. In People v Catu (4 NY3d 242 [2005]) and People v Van Deusen (7 NY3d 744 [2006]), specific performance was not a viable option, so this Court had no occasion to address the issue. In that regard, in Catu, defendant pleaded guilty in exchange for the statutory minimum sentence (4 NY3d at 244). Because defendant had

already received the minimum sentence, vacatur of the defendant's plea was the only possible remedy for the error. In Van Deusen, the defendant was misinformed about the possible sentencing range; she believed that the range was not less than five years or no more than 15 years in prison (7 NY3d at 745). The court modified the sentence to eight years imprisonment and five years of post-release supervision, but that sentence was more than the least amount of incarceration time she could have hoped to get at the time of her plea (id.). Thus, it could not be said with assurance in Van Deusen that the defendant got the full benefit of her plea bargain. Similarly, in People v Louree (8 NY3d 541 [2007]), the sole issue before this Court was whether the defendant was required to preserve for appellate review his complaint of the Catu error.

Here, the trial court chose the remedy of specific performance, which in my view, it had the authority to do. At the time of his plea, defendant was promised a sentence of 15 years in prison. After the trial court's modification, defendant received the full benefit of his bargain, plus a windfall. Thus, unlike in Catu and Van Deusen, the modified sentence comported with the understanding and expectations of defendant at the time of his guilty plea. Finally, the trial court here had good reason to choose the remedy of specific performance over vacatur of the plea. Specifically, the People would be severely prejudiced if defendant's daughter was subjected to testifying once again at a new trial after several years have passed.

* * * * * * * * * * * * * * * * * *

Order reversed, defendant's plea vacated and case remitted to Supreme Court, New York County, for further proceedings on the indictment. Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo and Jones concur. Judge Pigott dissents and votes to affirm in an opinion in which Judges Read and Smith concur.

Decided November 15, 2007

People v Hill
2007 NY Slip Op 00589 [39 AD3d 1]
January 30, 2007
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, May 23, 2007

[*1] APPEARANCES OF COUNSEL

Robert S. Dean, Center for Appellate Litigation, New York City (Barbara Zolot of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York City (David M. Cohn of counsel), for respondent.

{**39 AD3d at 2}

OPINION OF THE COURT

McGuire, J. [*2]

In a 32-count indictment issued in March 2001, defendant was charged with raping, sodomizing and sexually abusing his daughter. In April 2002, defendant proceeded to trial before Justice Allen and a jury. Following the direct examination of defendant's daughter, however, counsel informed the court that{**39 AD3d at 3} defendant wished to plead guilty to one count of first-degree rape in full satisfaction of the indictment. During the course of the ensuing, comprehensive plea colloquy, defendant admitted that on June 13, 2000 he had engaged in sexual

intercourse with his daughter by forcible compulsion, that her testimony on direct examination was true and that he had forced her to have sexual relations with him since she was nine years old. Before accepting defendant's guilty plea, Justice Allen informed defendant that the sentence would be 15 years in prison; defendant acknowledged that he understood. At sentencing on May 14, 2002, the negotiated 15-year prison sentence was imposed.

Nearly two years later, in March 2004, defendant moved pursuant to CPL 440.10 to vacate his conviction. Relying on People v Catu (4 NY3d 242 [2005]), defendant argued that his guilty plea was involuntary, because he had not been informed that his sentence included a five-year period of postrelease supervision. Following a hearing, Justice Allen denied defendant's motion in a written decision dated May 31, 2005. However, for the reasons discussed below, Justice Allen modified defendant's sentence to a prison term of 12½ years and 2½ years of postrelease supervision. Defendant now appeals, both from the judgment of conviction rendered May 14, 2002, as amended May 31, 2005, and, by permission of a Justice of this Court, from Justice Allen's order, entered May 31, 2005, which denied his motion to vacate the judgment and modified the sentence.

Although the issue is by no means free from doubt, reversal of the judgment and order appealed from is not required by the recent decision of the Court of Appeals in People v Van Deusen (7 NY3d

744 [2006]). A number of issues complicate the analysis of defendant's claim under People v Catu (4 NY3d 242 [2005]), and these issues must be discussed before the potential impact of Van Deusen can be appraised. At bottom, however, in the absence of an unequivocal mandate from the Court of Appeals requiring vacatur of the plea for every Catu violation, regardless of whether the defendant has been prejudiced by or even benefitted from the violation, I believe that the Legislature has made clear that defendant's claim of entitlement to that remedy should be rejected.

Justice Allen's approach to defendant's claim under Catu is sensible for at least three reasons. First, by modifying the sentence to a prison term of 12½ years and 2½ years of postrelease supervision, Justice Allen put defendant in a better position than he would have been in if he lawfully could have been{**39 AD3d at 4} sentenced to a term of 15 years with no period of postrelease supervision. Under the original sentence, defendant would be eligible for conditional release after serving six sevenths of a 15-year term, i.e., after serving 12 years and some 10 months (see Penal Law § 70.30 [4] [a]; § 70.40 [1] [b]; Correction Law § 803 [1] [c]). Under the modified sentence, defendant is eligible for conditional release after serving six sevenths of a 12½-year term, i.e., after serving 10 years and just under nine months (id.). Defendant's release from prison if he were not to receive any allowances for good behavior under Correction Law[*3]§ 803 would be required after 15 years under the original sentence, but is required 2½

years earlier, after 12½ years, under the modified sentence.

Against these benefits, there is only the fact that defendant would not have been subject to what the law denominates as a period of "postrelease supervision" under the original sentence. But assuming that under that sentence defendant would earn the allowances for good behavior and thus would be released after 12 years and 10 months, under Penal Law § 70.40 (1) (b) he would be subject to the supervision of the Board of Parole for the unserved portion (two years and two months) of the term. Accordingly, on this assumption he would be subject to what is tantamount to a period of postrelease supervision, and to such a period nearly as long as the one he is subject to under the modified sentence. Moreover, he would be conditionally released from prison significantly later (two years and one month later) under the original sentence than he would be under the modified sentence.

On the contrary assumption that defendant would not earn the allowances, he hardly is prejudiced by being subject to a 2½-year period of postrelease supervision following his release from prison after 12½ years. After all, on this hypothesis he would not even be released from prison under the original sentence until he had served the entire 15-year term. Being released from prison after 12½ years with a possibility of being returned to prison for up to 2½ years, is better than not being released after 12½ years with the certainty of remaining in prison for 2½ more years.

Surprisingly or not, defendant disagrees. At the hearing on his motion to vacate the conviction, he apparently testified that he would rather spend 15 years in prison than serve any time under a period of postrelease supervision. But as Justice Allen stated in his well-reasoned written opinion, that claim is{**39 AD3d at 5} "disingenuous at best; any rational person would choose liberty over incarceration." If defendant has some legally cognizable right to an irrational choice, the modified sentence presents no obstacle. If defendant were to earn the allowances for good behavior unwittingly or even against his will, the applicable statute provides only that a person who receives good behavior time and is eligible for release "shall, if he so requests, be conditionally released from the institution" (Penal Law § 70.40 [1] [b] [emphasis added]). The key to remaining in jail, in other words, would be in defendant's hands. As Justice Allen observed, "[s]ince he would then receive the 15-year sentence he was promised, there still would be no reason to allow him to take back his plea."

Defendant's position, moreover, is undermined as well by its consequences. If Justice Allen had modified the sentence by imposing a sentence of 10 years in prison with 2½ years of postrelease supervision, the People would have been entitled to have the plea vacated (see People v Farrar, 52 NY2d 302, 307-308 [1981] ["Where the record shows that the prosecutor's consent to a plea is premised on a negotiated sentence and a lesser sentence is later

deemed more appropriate, the People should be given the opportunity to withdraw their consent"]).[1] The logic [*4]of defendant's position is that he, too, would have the right to have his plea vacated despite the benefits such an unequivocal windfall would confer. If the sentence as actually modified is improper, the hypothetical modification also would be improper. Conversely, if such a hypothetical modification would not entitle defendant to have his plea vacated, the actual modification does not warrant that relief either. The precise extent of the windfall benefit cannot be outcome determinative.

Second, Justice Allen's approach furthers the People's strong interest in finality (see People v Keizer, 100 NY2d 114, 118 [2003] ["A guilty plea . . . generally marks the end of a criminal case, not a gateway to further litigation" (citation omitted)]; People v Frederick, 45 NY2d 520, 525 [1978] ["Only rigorous adherence by the courts to a policy of affording guilty pleas a great measure of finality will immunize plea negotiations from indiscriminate potshots"]).

Third, albeit relatedly, the measure of protection for the People's strong finality interest provided by Justice Allen's approach{**39 AD3d at 6} is particularly important in light of the absence of

---

[1] Here, of course, the People are not seeking to have the plea vacated. Indeed, as Justice Allen's written opinion indicates, the People suggested the modification in their opposition to defendant's motion to vacate.

any restrictions under current law on the timing of Catu claims. That is, no provision of CPL 440.10 or CPL 440.30 requires that a Catu claim be made within a particular time period or even that it be prosecuted diligently. Accordingly, a defendant may sit back and wait for strategic reasons (until, for example, he has reason to believe a key prosecution witness is or may not be willing or available to testify) before advancing a Catu claim.[2] Notably, although defendant was sentenced on May 14, 2002, he did not move until March 2004 to vacate the judgment on the ground that the failure to advise him of the period of postrelease supervision rendered his plea involuntary. Whatever the extent of the lack of diligence and attendant prejudice to the People in this case, a lack of diligence all but inevitably will occasion severe prejudice in at least some cases.

---

[2] Only one particular ground for relief under CPL 440.10—claims of newly discovered evidence—is subject to an express, due diligence requirement (CPL 440.10 [1] [g]). CPL 440.10 (3) (a) is not to the contrary. Although it creates a discretionary due diligence bar to certain CPL 440.10 motions, the bar arises only when the movant previously has appealed from the judgment and the ground raised in the motion was not determined upon the appeal. Thus, it does not purport generally to require that CPL 440.10 claims be raised with due diligence. Rather, its evident purpose is to permit the court to deny a second bite at the apple of review when a CPL 440.10 claim could have been raised with due diligence on direct appeal. Because defendant had not perfected his direct appeal at the time he moved to vacate the judgment pursuant to CPL 440.10, the People did not and could not ask Justice Allen to deny the motion under CPL 440.10 (3) (a).

Moreover, Justice Allen's approach is attractive to appellate courts in light of CPL [*5]470.05 (1), which commands that "[a]n appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties" (emphasis added). This is not to say that a Catu claim is inherently "technical" in nature. As discussed below, the Catu opinion makes clear that substantial rights of a defendant are or at least can be implicated when the direct consequences of a plea are not explained by the trial court to a defendant who offers to plead guilty. But as this case illustrates, it does not follow that substantial rights invariably are implicated let alone compromised whenever a Catu error occurs.[3] In addition, key issues on this consolidated appeal may be reasonably{**39 AD3d at 7} considered "technical" in nature, such as whether Penal Law § 70.45 (2) should be construed so as to deem a particular period of postrelease supervision to have been imposed whenever a sentencing court fails to specify the period upon sentencing a defendant for a violent felony offense and whether Justice Allen was without authority under CPL 430.10 to modify the sentence. In any event, a reasonable interpretation

---

[3] The substance of a Catu claim is that the defendant did not "knowingly, voluntarily and intelligently choose among alternative courses of action" (Catu, 4 NY3d at 245) due to not being aware of the postrelease supervision component of the sentence. Obviously, at least some such claims will be raised by defendants whose attorneys were sufficiently circumspect as to have informed them of that component prior to the plea.

of CPL 470.05 (1) is that an error or defect is "technical" if it does not affect adversely a substantial right. As discussed above, no substantial rights of defendant were prejudiced by the modified sentence. Accordingly, given this mandate to disregard technical errors, and in the absence of an unequivocal mandate by the Court of Appeals that vacatur of the plea is the only remedy for a Catu violation, defendant's claim of entitlement to that remedy should be rejected.

Defendant advances two distinct arguments in support of reversal, each of which alone would be sufficient to compel vacatur of his guilty plea. He argues both that the sentence modification was barred by CPL 430.10 and that Catu required that his guilty plea be vacated. With respect to the first contention, the controlling precedent is People v Richardson (100 NY2d 847 [2003]).

In Richardson, the issue was whether CPL 430.10 prohibited the trial court from modifying the sentences previously imposed on two intentional murder convictions so that they would run consecutively to an undischarged term of imprisonment that had been imposed years earlier on an unrelated murder conviction. By operation of law, the trial court's failure to specify at the time sentence was imposed that the sentences on the intentional murder convictions would run consecutively to the undischarged term resulted in those sentences running concurrently with the undischarged term (id. at 849, citing Penal Law § 70.25 [1] [a]). In relevant part, CPL 430.10 provides

that "[e]xcept as otherwise specifically authorized by law," a sentence of imprisonment that is "in accordance with law . . . may not be changed, suspended or interrupted once the term or period of the sentence has commenced." [*6]

After reviewing its "CPL 430.10 jurisprudence" (100 NY2d at 850), the Court stated that "[d]espite the breadth" of this statutory prohibition, trial courts not only have "the inherent authority to remedy an illegal sentence," but also may "correct an error{**39 AD3d at 8} where the sentence imposed deviates from what was expected by the court and the parties when a sentencing agreement was reached" (id. at 850, 851). With respect to the latter class of errors, however, the Court made clear that "[t]he authority to modify a lawful sentence that has commenced is limited to situations where the record in the case clearly indicates the presence of judicial oversight based upon an accidental mistake of fact or an inadvertent misstatement that creates ambiguity in the record" (id. at 853).

Here, the error in the sentence originally imposed may well reflect "judicial oversight" (id.), but it was based on an apparent mistake of law, not of fact, and was not an "inadvertent misstatement" (id.) of the type "which our reason tells us is a mere mistake" (id. at 851, quoting People v Minaya, 54 NY2d 360, 365 [1981], cert denied 455 US 1024 [1982] [internal quotation marks omitted]).

Accordingly, Justice Allen's authority to modify the original sentence turns on whether it was an "illegal sentence." Unlike the "mere mistake" line of cases, determining whether a sentence is "illegal" requires a purely objective analysis. Assuming no dispute about what the sentence imposed was, the inquiry is simply whether the sentence imposed was authorized by law. In People v Williams (87 NY2d 1014 [1996]), for example, the defendant was sentenced to an indeterminate prison term of 3½ to 7 years in prison following his plea of guilty to a class C felony offense. As a first felony offender, however, the applicable provision of the Penal Law required that the minimum period be not "more than one-third of the maximum term imposed" (Penal Law § 70.00 [3] [b]). By contrast, for a second felony offender the law required that the minimum period "be fixed by the court at one-half of the maximum term imposed" (Penal Law § 70.06 [4] [b]). The trial court, acting sua sponte, resentenced the defendant to 3½ to 10½ years, "noting that it had incorrectly sentenced defendant as a predicate rather than as a first felony offender" (People v Williams, 87 NY2d at 1015). The Court of Appeals upheld the sentence modification on the ground that "the trial court had the inherent power to correct an illegal sentence" (id.).[4] {**39 AD3d at 9}

---

[4] The extent of that power, of course, is a separate issue. The Court rejected the defendant's double jeopardy objection to the modification on the ground that it "would be colorable only if the defendant's sentence had been increased beyond his legitimate expectations of what the final sentence

(Continued...)

Similarly, in People v DeValle (94 NY2d 870 [2000]), the defendant was sentenced upon his guilty plea to an indeterminate prison term of 2 to 4 years to run concurrently with an undischarged portion of an earlier sentence. Penal Law § 70.25 (2-a), however, "required that [*7]defendant's sentence run consecutively with his prior sentence" (id. at 871). After being so advised by the Department of Correctional Services, the court resentenced the defendant to a consecutive term. As in Williams, the Court of Appeals upheld the sentence modification, holding that "the trial court had inherent power to correct the illegal sentence it initially imposed" (id.). Also as in Williams, the Court made clear that the scope of that power was a separate issue. Under the particular facts in DeValle (i.e., the defendant's stated position at the resentencing proceeding that he wanted neither to withdraw his plea nor to be resentenced), the trial court did not exceed its authority by imposing a more severe sentence than the one originally promised (id. at 871-872).

Although defendant argues that the sentence originally imposed was "perfectly legal," his argument depends on what the sentence originally imposed was. If the sentence originally imposed was 15 years in prison with five years of postrelease supervision, defendant would be correct. At the original sentencing proceeding, however, Justice

(...Continued)
should be" (id.). During the plea proceedings, the defendant was advised that he could receive a sentence of up to 15 years in prison (id.).

Allen stated only as follows: "Very well, then, Mr. Hill, it's a promised sentence, as you know, 15 years. There will also be a final order of protection which I will sign." Apart from going on to impose "a court fee called a surcharge" of $200, Justice Allen said nothing else relating to the sentence he was imposing. Moreover, as Justice Allen stated in his written decision on defendant's motion to vacate, "a five-year period of [postrelease supervision] was added" after the 15-year sentence was imposed, but not by Justice Allen. Rather, as he noted, it was added "presumably by prison authorities acting pursuant to [Penal Law] § 70.45."

Apparently mindful of these undisputed facts, defendant maintains that the "perfectly legal" sentence of 15 years in prison with five years of postrelease supervision was the "sentence imposed by operation of law" under Penal Law § 70.45 (1) and (2). Although subdivision (1) stipulates that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision," nothing in the{**39 AD3d at 10} statute specifies that when the sentencing court is silent with respect to the required period of postrelease supervision, a five-year or any other period is deemed to have been imposed. The issue, accordingly, is one the Court of Appeals has not addressed: whether Penal Law § 70.45 should be construed to deem a particular period of postrelease supervision to have been imposed whenever a sentencing court imposes sentence pursuant to Penal Law § 70.02 and fails to specify the period.

After providing first that "[t]he period of post-release supervision for a determinate sentence shall be five years," former subdivision (2) of section 70.45 goes on to create an exception when the defendant has not previously been convicted of a felony offense. Thus, former subdivision (2) states, "except that such period shall be three years whenever a determinate sentence of imprisonment is imposed pursuant to section 70.02 of this article upon a conviction for a class D or class E violent felony offense."[5] This proviso then follows:

"provided, however, that when a [*8]determinate sentence is imposed pursuant to section 70.02 of this article, the court, at the time of sentence, may specify a shorter period of post-release supervision of not less than two and one-half years upon a conviction for a class B or class C violent felony offense and a shorter period of post-release supervision of not less than one and one-half years upon a conviction for a class D or class E violent

---

[5] Although subdivision (2) of Penal Law § 70.45 was amended, effective January 13, 2005 (see L 2004, ch 738, § 35), the amendments do not affect the issue of whether a five-year period of postrelease supervision should be deemed to have been imposed whenever a sentencing court fails to specify the period upon sentencing a defendant pursuant to Penal Law § 70.02 for a class B or class C violent felony offense.

felony offense" (Penal Law § 70.45 [2] [emphasis added]).[6]

As is evident, it is sensible to construe Penal Law § 70.45 (2) to deem a five-year period of postrelease supervision to have been imposed whenever a sentencing court fails to specify the period upon sentencing a second felony offender to a determinate sentence for a violent felony offense pursuant to Penal Law § 70.04 or § 70.06 (see People v Lingle, 34 AD3d 287 [2006]; People v Sparber, 34 AD3d 265 [2006]). After all, no period of postrelease supervision is authorized other than the five-year{**39 AD3d at 11} period specified in subdivision (2). For all violent felony offenders who are not second felony offenders, however, the statute permits the trial court to choose from within a range of periods of postrelease supervision and select the period it deems appropriate in each particular case; no period within the ranges, moreover, enjoys any presumptive status.[7] [*9]

---

[6] Defendant was convicted of the class B violent felony offense of rape in the first degree (Penal Law § 130.35 [1]; § 70.02 [1] [a]) and was sentenced pursuant to Penal Law § 70.02.

[7] The statute cannot be construed to authorize the Department of Correctional Services to impose the appropriate period of postrelease supervision whenever a trial court fails to perform the duty the statute enjoins it to perform. No language in the statute supports such a construction, and determining the appropriate sentence within the ranges prescribed by the Legislature is quintessentially a judicial function (see People v Ramirez, 89 NY2d 444, 449-450 [1996]; People v Farrar, 52

(Continued...)

When a court imposes sentence pursuant to Penal Law § 70.02 for a violent felony offense and fails to specify the period of postrelease supervision, it arguably would not be unreasonable to conclude that either a three- or five-year period of postrelease supervision is deemed to have been imposed as a matter of law. Some support for that conclusion is provided by the permissive language of the proviso ("the court . . . may specify a shorter period"

(...Continued)
NY2d 302, 305-306 [1981]; Hill v United States ex rel. Wampler, 298 US 460, 464 [1936]). Indeed, a panel of the Second Circuit has held that a defendant's right to due process under the Federal Constitution was violated when the sentencing court made no mention of a period of postrelease supervision in imposing sentence and the Department of Correctional Services thereafter added a five-year period of postrelease supervision to his sentence (Earley v Murray, 451 F3d 71, 74-76 [2d Cir 2006]). The court also held that even if a five-year period of postrelease supervision was mandated by Penal Law § 70.45 (2), under the Supreme Court's decision in Wampler it could become part of the sentence consistent with due process only through a judicial sentencing proceeding (id.). We need not determine whether we agree with this reading of Wampler. Rather, it is sufficient to note that a significant constitutional issue would be raised if Penal Law § 70.45 (2) were construed to mandate the longest of the authorized periods of postrelease supervision (five years for a class B or C violent felony offense and three years for a class D or E violent felony offense) whenever sentence is imposed pursuant to Penal Law § 70.02 and the sentencing court fails to specify the period of postrelease supervision. Avoiding that constitutional question provides another reason to conclude that under such circumstances no period of postrelease supervision is added to a defendant's sentence by operation of law (see Jones v United States, 526 US 227, 239 [1999]).

[emphasis added]) that follows the two declarations that the period "shall be" five or three years. But that conclusion does not necessarily follow, as it does when sentence is imposed for a violent felony offense pursuant to Penal Law § 70.04 or § 70.06 and the court similarly fails to specify a period of postrelease supervision, from the absence of any authorized{**39 AD3d at 12} period of postrelease supervision other than a three- or five-year period.

An alternative construction of Penal Law § 70.45 (2) is suggested by the Court of Appeals' decision in People v Richardson (100 NY2d 847 [2003]). In Richardson, the trial court failed to specify at the time of sentencing whether the consecutive sentences it imposed on two intentional murder convictions were to run concurrently or consecutively to an undischarged term of imprisonment. While no provision of law required the trial court to specify whether the sentences would run concurrently or consecutively, the governing statute expressly specifies the legal consequences of a trial court's omission. As the Court of Appeals stressed in quoting Penal Law § 70.25 (1) (a), "[i]f the court does not specify the manner in which a sentence imposed by it is to run . . . [a]n indeterminate or determinate sentence shall run concurrently with all other terms" (id. at 852). Accordingly, albeit implicitly, the Court held that concurrent sentences were the sentences originally imposed and that these sentences were lawful (id. at 852-853).

Thus, the absence of a comparable provision in Penal Law § 70.45 (2) specifying the default rule supports the conclusion that no period of postrelease supervision is deemed to have been imposed when a court sentences a defendant pursuant to Penal Law § 70.02 for a violent felony offense and does not specify the period of postrelease supervision. In construing a statute, moreover, the touchstone is the intent of the Legislature (see [*10]Riley v County of Broome, 95 NY2d 455, 463 [2000]). At least in some cases, the failure of a sentencing court to specify a period of postrelease supervision will reflect a mere oversight or failure to appreciate that the court has the discretionary authority to select the appropriate period from within the specified range, not a conscious belief that a three- or five-year period, as the case may be, both is the appropriate period and the legal consequence of its silence. If we assume the Legislature was aware of that practical reality, it is hardly obvious that the Legislature intended the maximum permissible period of postrelease supervision to be imposed automatically whenever a sentencing court fails to specify a period of postrelease supervision in imposing sentence pursuant to Penal Law § 70.02. That would mean, after all, that the Legislature intended the maximum period to be imposed even though, at least in some cases, the sentencing court would have determined in its discretion that a lesser period was appropriate. On this score, finally, the rule of lenity{**39 AD3d at 13} also counsels in favor of not construing Penal Law § 70.45 (2) as providing for such a default rule (see People v Green, 68 NY2d

151, 153 [1986]; Huddleston v United States, 415 US 814, 830-831 [1974]).[8] [*11]

In short, the better conclusion is that no period of postrelease supervision is imposed by operation of law when a sentencing court does not specify a period upon sentencing a defendant for a

---

[8] There is authority for the proposition that a five-year period of postrelease supervision was added to defendant's sentence by operation of law (see People v Hollenbach, 307 AD2d 776 [4th Dept 2003], lv denied 100 NY2d 642 [2003]; People v Bloom, 269 AD2d 838 [4th Dept 2000], lv denied 94 NY2d 945 [2000]), including this Court's decision in People v Adams (13 AD3d 76 [2004], lv denied 4 NY3d 851 [2005]; cf. People v Crump, 302 AD2d 901 [4th Dept 2003], lv denied 100 NY2d 537 [2003] [concluding that a three-year period of postrelease supervision was imposed by operation of law when defendant was sentenced, pursuant to Penal Law § 70.02, for a class D violent felony offense]). In Adams, which we decline to follow, this Court cited only the Fourth Department's decision in Hollenbach (supra) for essentially that proposition. In Hollenbach, the Fourth Department stated that "[b]ecause Penal Law § 70.45 (2) provides that the period of postrelease supervision on a conviction of a class C violent felony offense is five years, 'unless the court specifies a shorter period,' there is no need for the court to specify a period of postrelease supervision at sentencing" (307 AD2d at 776 [citations omitted]). To the extent Hollenbach thereby suggests that the phrase "unless the court specifies a shorter period" appears in Penal Law § 70.45 (2), it is not correct. In fact, as is clear from Bloom (supra), one of the two decisions cited in Hollenbach, the phrase represents the opinion of a commentator (Bloom, 269 AD2d at 838, quoting Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 70.45, 1999-2000 Interim Pocket Part, at 81; see current Practice Commentary, Book 39, Penal Law § 70.45, at 396 [2004]).

violent felony offense pursuant to Penal Law § 70.02. Accordingly, it follows that the sentence actually imposed by Justice Allen was illegal, because "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision" (Penal Law § 70.45 [1]). Because the sentence originally imposed was illegal, Justice Allen had the authority to modify it, sua sponte or otherwise (see People v Wright, 56 NY2d 613 [1982]). The only remaining issue is whether Justice Allen exceeded the scope of that authority. In turn, that issue reduces to whether People v Catu (supra) required that Justice Allen respond to the illegality of the sentence solely by vacating defendant's conviction.[9]

But even assuming that a five-year period of postrelease supervision was imposed by operation of law, defendant would not be entitled to reversal for that reason. To be sure, the{**39 AD3d at 14} mistake made in this case does not fall within the class of "mere mistake[s]" (Richardson, 100 NY2d at 851) that the Court of Appeals has held to be within the inherent authority of the sentencing court to remedy. But no case binding on this Court or the Court of Appeals precludes recognition of an additional exception to the prohibition of CPL 430.10, which "essentially restates the common law . . . and does not alter the power of a court to correct errors or mistakes concerning sentences" (People v

---

[9] For the reasons discussed below, Catu should not be read to require vacatur of the conviction.

Minaya, 54 NY2d 360, 364 [1981] [citations omitted]; see also id. at 366 [recognizing sentencing court's inherent authority to correct its mistake and observing that "we know of no case binding on this court" which would bar correction of the error]).

Such an additional exception to the statutory prohibition of CPL 430.10 should be recognized for the same key reason that Catu should not be construed to require that defendant's conviction be vacated: a contrary conclusion is inconsistent with the mandate of CPL 470.05 (1) to decide appeals without regard to technical defects.

Although the Catu opinion does not expressly establish a per se rule of reversal, nothing therein suggests that some failures to advise a defendant about postrelease supervision do not require that the guilty plea be vacated. To the contrary, the opinion broadly states that "[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction" (4 NY3d at 245). Apart from referring to what such a failure of "a court" requires, rather than what was required by the failure so to advise Catu, the Court immediately went on to make clear that harmless error analysis is not applicable to such failures (id.).

Despite the broad scope of the Court's reasoning in Catu, it is axiomatic that an appellate

[*12]court decides only the case before it (see Matter of Seelig v Koehler, 76 NY2d 87, 92 [1990] [distinguishing prior decisions and observing that "the identification and weighing of all the unique and particular facts of each case governs"], cert denied 498 US 847 [1990]; Roosa v Harrington, 171 NY 341, 350 [1902] ["each case, as it arises, must be viewed and decided according to its own particular facts and circumstances, and will become a controlling precedent, only, where the facts are the same"]). In Catu, the lowest determinate{**39 AD3d at 15} sentence authorized for a second felony offender, like Catu, convicted of attempted robbery in the second degree, a class D violent felony offense (Penal Law § 70.02 [1] [c]), is three years (Penal Law § 70.06 [6] [c]). As the Court's opinion states, that is the sentence Catu received (4 NY3d at 244). Because he received the minimum sentence authorized by law, neither the Court nor the parties had any occasion to discuss the extent to which a sentence reduction might be an adequate remedy.

In Van Deusen (7 NY3d 744 [2006]), the trial court did not make any mention of postrelease supervision in the course of accepting the defendant's plea of guilty to first-degree robbery and promising a sentence of not less than five or more than 15 years in prison. At sentencing, the defendant moved to withdraw the plea on the ground that she had not been advised she was subject to postrelease supervision. The trial court denied the motion and sentenced her to eight years' imprisonment and five years of postrelease supervision (id. at 745).

Reversing the Appellate Division, which had affirmed, the Court of Appeals vacated the guilty plea. Quoting from Catu, the Court stated that " '[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction' " (id. at 745-746, quoting People v Catu, 4 NY3d at 245). The Court went on to hold as follows:

"While defendant's sentence here, including postrelease supervision, was actually less than the maximum potential period of incarceration that she agreed to serve, this case is still indistinguishable from Catu. At the time defendant pleaded guilty, she did not possess all the information necessary for an informed choice among different possible courses of action because she was not told that she would be subject to mandatory postrelease supervision as a consequence of her guilty plea. Accordingly, defendant's decision to plead guilty cannot be said to have been knowing, voluntary and intelligent" (Van Deusen, 7 NY3d at 746).

Here, as in Catu and Van Deusen, defendant unquestionably did not possess all the information necessary for an informed choice. In a critical respect, however, this case nonetheless is{**39 AD3d at 16} distinguishable from both Catu and Van Deusen. In both Catu and Van Deusen, no lawful action could be taken in those cases after the plea

was entered—other than vacating the plea—that would render academic the claim that the defendant did not make an informed choice. In this case by contrast, the modification of defendant's sentence did precisely that. As discussed above, there is no rational reason why defendant, having accepted a sentence of 15 years in [*13]prison, would reject a sentence of 12½ years in prison and 2½ years of postrelease supervision. As a result of the sentencing modification, in other words, it can be said that defendant was not prejudiced in the slightest by not being aware at the time of the plea that a period of postrelease supervision was mandatory. Indeed, the modification put defendant in a better position than he would have been if the promised sentence lawfully could have been imposed.

To vacate the plea under these circumstances would confer upon defendant a benefit—and, depending on subsequent events, perhaps a windfall—that is not necessary to rectify the wrong done at the plea. By contrast, to recognize that defendant was not prejudiced by the Catu violation in light of the sentencing modification and affirm the judgment of conviction would promote the People's strong interest in finality (see People v Keizer, 100 NY2d at 118; People v Frederick, 45 NY2d at 525). Moreover, the sentencing modification essentially operated to give defendant the full benefit of the sentence he was promised at the time of the plea. As the Court of Appeals has stated, "the failure or inability to fulfill a [sentencing] promise requires either that the plea of guilty be vacated or the promise fulfilled, but there is no indicated preference

for one course over the other" (People v Selikoff, 35 NY2d 227, 239 [1974], cert denied 419 US 1122 [1975]). To the contrary, "[t]he choice rests in the discretion of the sentencing court" (id.).

As noted, the Court held in Van Deusen that the case was "indistinguishable from Catu" even though the "defendant's sentence . . . , including postrelease supervision, was actually less than the maximum potential period of incarceration that she agreed to serve" (Van Deusen, 7 NY3d at 746). This observation does not render this case indistinguishable from Van Deusen. To the contrary, Van Deusen would be indistinguishable only if the sentence therein, including postrelease supervision, was actually less than the minimum period of incarceration that she had agreed to serve. Here, the modified sentence, including postrelease supervision, is actually less than the{**39 AD3d at 17} sentence defendant agreed to serve. Under these circumstances, where defendant was not adversely affected in any way by the Catu error, it makes no sense to vacate the plea merely because, at the time of the plea, defendant "did not possess all the information necessary for an informed choice among different possible courses of action" (id.).

The insignificance of the Catu error in this case can be appreciated more readily by considering what the fate of Catu claims would be if the requirement of a period of postrelease supervision were to be repealed pursuant to a statute made effective as to all cases in which sentence had not yet been imposed. Surely a defendant who pleaded

guilty prior to such an enactment and had an otherwise viable Catu claim could not plausibly insist at sentencing that the court was required to vacate the plea. The postplea enactment would eliminate any possible prejudice and thus render academic the claim that the defendant did not possess all the necessary information at the time of the plea. In other words, by virtue of the postplea enactment, what had been a necessary item of information became an irrelevancy.

In this case, the postplea sentencing modification similarly eliminated any possible prejudice to defendant. To be sure, unlike this hypothetical defendant, defendant will serve a period of postrelease supervision. Nonetheless, the sentencing modification put defendant in a better position than he would have been if the promised sentence lawfully could have been imposed. By virtue of the postplea sentencing modification, what had been a necessary item of [*14]information became an irrelevancy.

In concluding that Van Deusen is indistinguishable, the dissent mistakenly focuses on the fact that the sentence actually imposed was less than "the maximum sentencing exposure for which she bargained" (emphasis added). If the defendant in Van Deusen had known she would receive a sentence of eight years in prison and five years of postrelease supervision, it certainly is possible she might not have decided to plead guilty. A different conclusion is not required simply because she was told at the time of the plea that she could receive as much as 15

years in prison. After all, it is possible she pleaded guilty in the hope or belief that she would receive a sentence of five years. Accordingly, in Van Deusen the Court of Appeals had good reason not to be impressed by the fact that the sentence actually imposed was less than the maximum sentence for which she bargained.

Consider, however, how different the analysis would be if the sentence actually imposed in Van Deusen had been 2½ years in {**39 AD3d at 18}prison and 2½ years of postrelease supervision, i.e., a total sentence less than the minimum period of incarceration to which she was exposed. Obviously, it cannot be supposed that the defendant would not have pleaded guilty if she had known that the sentence would be equal to or less than the minimum sentence for which she bargained. Similarly, and the dissent apparently agrees, it cannot be supposed that defendant would not have pleaded guilty if he had known that the sentence actually imposed would be a term of 12½ years in prison with 2½ years of postrelease supervision. Thus, to reiterate, Van Deusen would be indistinguishable only if the sentence actually imposed had been less than the minimum period of incarceration that she had agreed to serve.

Finally, one other observation about the dissent's writing is in order. Albeit with some uncertainty, the dissent concedes that "the sentencing court's remedy was at least arguably sensible, while defendant's position appears not to be." By thus hedging its concession, the dissent

avoids deciding whether defendant is complaining about a "technical error[ ] or defect[ ] which do[es] not affect [his] substantial rights" (CPL 470.05 [1]). Unless the unequivocal mandate of the Legislature to appellate courts can be disregarded, however, the Court must decide that very issue. Moreover, although the dissent refers to the sentencing court's "arguably sensible" remedy, it does not explain how that remedy might have been inadequate to prevent prejudice to one of defendant's substantial rights.

Accordingly, the judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered May 14, 2002, as amended May 31, 2005, convicting defendant, upon his plea of guilty, of rape in the first degree, and sentencing him to a term of 12½ years with 2½ years of postrelease supervision, and the order, same court and Justice, entered on or about May 31, 2005, which denied defendant's CPL 440.10 motion to vacate the judgment and modified the sentence, should be affirmed.

Marlow, J. (dissenting).

I would reverse. Defendant pleaded guilty based upon a promise that he would receive a 15-year definite prison term. However, the plea was defective, because the court did not inform defendant at the time he pleaded guilty that the promised sentence would be followed by five years of mandatory postrelease supervision (see People v Catu, 4 NY3d 242 [2005]). Accordingly, defendant moved to vacate the sentence, a motion the court granted to the extent of modifying defendant's

sentence so that the jail time and mandatory postrelease{**39 AD3d at 19} supervision together equaled the promised 15-year sentence under the plea agreement. Notwithstanding the sentencing modification, defendant nonetheless maintains he is entitled to nothing less than vacatur of his plea.

I agree with the majority to the extent that the sentencing court's remedy was at least arguably sensible, while defendant's position appears not to be. There is no question that the modified sentence is a more lenient one and that defendant is better off than he would have been had the court been able to impose the sentence, as originally promised, of 15 years, with no postrelease supervision. Defendant would have us believe that he would rather face an uncertain total sentence greater than 15 years, if convicted after a future trial upon vacatur of his defective plea, than the 12½ years in prison followed by 2½ years' postrelease supervision as imposed by the sentencing court.

In any event, regardless of whether defendant's present claim is or is not sincere, I believe that the following clear language in the Court of Appeals' recent decision in People v Van Deusen (7 NY3d 744, 746 [2006]) requires that the plea be vacated:

"While defendant's sentence here, including postrelease supervision, was actually less than the maximum potential period of incarceration that she agreed to serve, this case is still indistinguishable from Catu. At the time defendant pleaded guilty, she

did not possess all the information necessary for an informed choice among different possible courses of action because she was not told that she would be subject to mandatory postrelease supervision as a consequence of her guilty plea" (emphasis added).

I believe this broad language in Van Deusen encompasses defendant's situation notwithstanding that Van Deusen was promised a certain sentencing range and this defendant was promised a definite sentence. The Court of Appeals was apparently not persuaded by the fact that Van Deusen's sentence, including postrelease supervision, was less than the maximum sentencing exposure for which she bargained. Here, the sentencing court modified defendant's sentence so the total sentence, including postrelease supervision, would equal the promised [*15]sentence. I perceive no difference in these two sentencing promises which would warrant disparate remedies—a vacatur for Van Deusen as the Court of Appeals held, and sentence modification for this defendant as the majority maintains—in light of Van Deusen's above-quoted focus on the question of{**39 AD3d at 20} whether the defendant possessed all the information necessary to make an informed choice regarding the plea, not on whether the ultimate sentence the court actually imposed comported with its sentence promise.

In my view, because Van Deusen appears dispositive, the issue discussed by the majority regarding the legality of the sentence originally imposed need not be reached.

I also believe that, in the aftermath of People v Van Deusen, this Court may not carve out an additional exception to the statutory prohibition of CPL 430.10, as the majority asserts, and I respectfully disagree with the majority's further position that CPL 470.05 (1) requires remedies other than vacatur in situations like this. Given the present state of the law, Van Deusen's interpretation of Catu's language appears to control. Any statutory changes should be left to the Legislature and any exceptions to the Van Deusen and Catu holdings, in my judgment, should reside exclusively with the Court of Appeals.

Gonzalez and Catterson, JJ., concur with McGuire, J.; Saxe, J.P., and Marlow, J., dissent in a separate opinion by Marlow, J.

Judgment, Supreme Court, New York County, rendered May 14, 2002, as amended May 31, 2005, and order, same court, entered on or about May 31, 2005, affirmed.

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

THE PEOPLE OF THE STATE OF NEW YORK,

-against

ANTHONY HILL, Defendant.

Ind. No. 1694/01

For the People: Olivia Sohmer
For the Defendant: Lisa Joy Robertson

JUSTICE BRUCE ALLEN:

In the recent case of People v. Catu, 4 NY3d 242 (2005), the Court of Appeals held that a trial court's failure to mention post-release supervision ("PRS") during a plea allocution renders the plea not fully knowing and the plea must therefore be vacated. The question here is: does this rule apply without exception? Under the particular circumstances of this case. I have concluded that Catu -- despite its mandatory wording --does not require a vacatur and that, instead, the original promise can be honored.

This very serious case can be described briefly as follows. The grand jury indicted the defendant for 32 separate crimes, including three counts of Rape in the First Degree and nine counts of Sodomy in the First Degree. The People's theory was that the

defendant had engaged in a long-term sexual assault upon his own daughter, Toni Hill.

In April, 2002, the defendant's jury trial commenced before me. Ms. Hill, a poised and highly-intelligent young woman, testified in heart-wrenching detail that the defendant had repeatedly forced her to engage in sexual acts over a six-year period beginning when she was only nine years old. During a break in Ms. Hill's direct examination, the defense counsel, Barry Weinstein, asked the prosecutor, Karen Friedman-Agnifilo, whether a plea offer was still available. (Prior to trial, the defendant had rejected a plea offer of 10 years in jail.) Mr. Weinstein's overture led to further discussions back and forth. Eventually, the defendant agreed to plead guilty to one count of Rape in the First Degree in exchange for a determinate sentence of 15 years in jail. During the plea allocution, the defendant admitted inter alia that Ms. Hill's testimony was true and that he had resorted to forcible compulsion to rape her. Defendant was sentenced as promised on May 14, 2002. Neither the parties nor the court made any reference at any time to PRS. Later on, a five-year period of PRS was added, presumably by prison authorities acting pursuant to CPL §70.45.

Defendant has now moved pursuant to CPL §440.10(1)(h) to vacate his conviction. He contends that his plea must be vacated because he was never advised that he would be subject to the five year period of PRS after serving his 15 years. New counsel appeared on both sides. In a decision dated July 20, 2004, I directed that a hearing be held to

determine whether the defendant would have accepted the plea offer with the PRS added in. Recent First Department case law indicated that such a hearing was necessary. See, People v. Ammarito, 306 AD2d 99 (2003); People v. Catu, 2 AD3d 306 (2003).

In December, 2004, the hearing took place. The defendant was the only witness to testify. He stated that no one had ever informed him that he would be subject to PRS as a result of the plea, and that he only learned of PRS in conversations with other inmates at state prison. He maintained that he never would have entered the guilty plea if he had known that he would be subject to five years of PRS upon completion of the 15 year prison term. He explained that any plea deal that included PRS would have been unacceptable because he feared that members of his family would make false allegations against him. The defense also submitted an affirmation from Mr. Weinstein, who stated that he had no recollection of discussing PRS with the defendant.

At the conclusion of the hearing, the prosecutor relied on the First Department cases cited above and argued that the defendant's testimony was not credible. Citing the timing of the defendant's request to plead guilty, she asserted that the defendant would have accepted the promised sentence even if he had known that it included the additional five years of PRS. While my decision was pending, the Court of Appeals decided Catu and clearly rejected such an analysis. Given the obvious

significance of Catu, however, both sides were permitted to make additional arguments. The prosecutor now argues that the defendant's original sentence of 15 years can be modified to a legal sentence of 12 1/2 in jail plus 2 1/2 years of PRS. Although the prosecutor made no specific argument about Toni Hill, one may infer that the desire to spare Ms. Hill played a role in the prosecutor's position. The defense counsel countered the modification argument by referring to the mandatory language of Catu. According to the defense counsel Catu requires that the defendant's plea must be vacated.

In my judgment Catu can and should be distinguished. When a promised sentence turns out to be illegal, the trial court has always had the inherent power to modify the sentence on its own, so long as the corrected sentence is sufficiently comparable to the promised sentence that the "defendant's legitimate expectation of finality is not violated." People v. Williams, 87 NY2d 1014; People v. Rivera, 1 AD3d 385 (2'd Dept 2003); People v. Pablo Rivera, 289 AD2d 1020 (4th Dept 2001). For example, in Pablo Rivera the defendant pleaded guilty to Sexual Abuse in the First Degree in exchange for a promised determinate sentence of five years. After sentencing, the court realized that an indeterminate sentence was required. *Sua sponte*, the court amended the sentence to a term of 3 to 6 years. The Fourth Department held that the court had acted within its power and that even though the maximum term of the corrected sentence was longer

than the original sentence, the two were sufficiently comparable.

In Catu, no such modification was realistically possible and the subject was never discussed. There, the defendant pleaded guilty to Attempted Robbery in the Second Degree in exchange for a promised sentence of three years, which represented the minimum term available to a second felony offender. He was not informed that, as a predicate felon, he also would be subject to a mandatory five year period of PRS. Thus his total exposure of jail time and PRS was substantially longer than the three years he had been promised and no shorter jail sentence could be legally substituted. His plea was not knowing, voluntary, and intelligent because he was not informed of the true consequences of his plea. And since the consequences themselves could not legally be modified to comport with the terms of the explicit promise, the only remedy was to give him back his plea.

However, despite its somewhat sweeping language, nothing in Catu indicates that a defendant must be given the plea back even where the sentence can be legally modified to match the promise. When the plea is otherwise knowing, voluntary and intelligent, a modification would appear to be the most appropriate remedy. See, People v. Wyatt, 2 AD3d 218 (1st Dept 2003).

Here, the defendant pleaded guilty to Rape in the First Degree in exchange for a promised sentence of 15 years in jail. His legitimate expectation,

therefore, was that his sentence would be completed in 15 years. That sentence, unfortunately, proved to be an illegal one. But unlike the defendant in Catu, this defendant can be given a legal sentence on his plea, including PRS, that is similar in length to the promised sentence. Under PL§§ 70.02 and 70.45, the defendant, as a first-time felony offender convicted of a B violent felony, could have been sentenced legally to 12 1/2 years in prison followed by 2 1/2 years of PRS, as now urged by the People.

Clearly such a sentence would not violate the defendant's legitimate expectation of finality. To be sure, the defendant testified at the hearing that he would rather do 15 years in prison than spend any time under PRS. I find that claim to be disingenuous at best; any rational person would choose liberty over incarceration. But if the defendant truly feels that way, presumably he can simply refuse to comply with the terms and conditions of his release and remain incarcerated for the full term. Since he would then receive the 15 year sentence he was promised, there would still be no reason to allow him to take back his plea.

Accordingly, in the interests of finality and the interests of justice. the defendant's sentence shall be amended to a term of 12 1/2 years imprisonment with 2 1/2 years of PRS. In all other respects, the motion to vacate judgment is denied.

May 31, 2005

(4) 07-1043 4/10/08

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-against-

ANTHONY HILL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Anthony Hill, by counsel Robert S. Dean and Barbara Zolot, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the State of New York as there has been no showing that the issue presented is one that merits consideration by this Court.

OPINIONS BELOW

The relevant state court opinions are reproduced in Petitioner's Appendix in Support of Petition for a Writ of Certiorari, cited herein as "State App."

JURISDICTIONAL STATEMENT

The State has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a) to review the opinion of the New York Court of Appeals reversing the judgment. As argued in more detail below, this Court lacks jurisdiction to conduct this review. Because the New York Court of Appeals relied solely on the State Constitution and state law for its determination, an adequate and independent state law ground bars review. Further, the New York Court of Appeals has

violated no federal constitutional principles. This Court has no supervisory power over state judicial proceedings.

STATEMENT OF THE CASE

In April 2002, respondent pleaded guilty to rape in the first degree in full satisfaction of the indictment. The court sentenced him to a determinate 15-year term. No mention was made, either during the plea or during the sentencing that followed one month later, of an additional five-year term of postrelease supervision. Respondent subsequently filed a post-judgment motion to vacate his plea, pursuant to New York Criminal Procedure Law § 440.10, asserting that his plea was involuntary because of the court's failure to inform him about post-release supervision. The trial court refused to vacate the plea, instead opting to resentence respondent, over his objection, to 12 ½ years in prison and 2 ½ years of post-release supervision.

REASONS FOR DENYING THE WRIT

I. AN ADEQUATE AND INDEPENDENT STATE LAW GROUND BARS REVIEW BY THIS COURT

This Court will not assume jurisdiction of a case resting on state law grounds. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Here, an adequate and independent state ground supports the determination of the New York Court of Appeals, barring review of the case by this Court.

First, in discussing the requirement of knowing and voluntary plea waivers, the New York Court of Appeals adverted only to the State Constitution, and directly relied on state common law. The court stated:

> As has been well-established in our law, when a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the

> waiver be knowing, voluntary and intelligent (see NY Const, art I, § 6; People v. Ford, 86 NY2d 397, 403 [1995]; see also McCarthy v. United States, 394 US 459, 466 [1969]["if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"]). (State App. at 2a)(emphasis added).

The New York Court of Appeals' citation to McCarthy does not represent an intertwining of state and federal constitutional principles as the State claims. While the state decision cites language from McCarthy, this Court decided McCarthy pursuant to its supervisory powers over the lower federal courts, 394 U.S. at 464-65, and expressly stated that it was not reaching "any of the constitutional arguments petitioner urges as additional grounds for reversal." Id. at 465. Accordingly, its inclusion in the state court decision does not show that "the New York and federal due process rules regarding plea bargaining are coextensive." (Petitioner for Writ of Certiorari ["State Pet."] at 16). In fact, the New York Court of Appeals has interpreted the due process clause of the State Constitution more expansively to provide greater protection than its federal counterpart. See Cooper v. Morin, 49 N.Y.2d 69, 79-82, 424 N.Y.S.2d 168, 174-176 (1979). The New York Court of Appeals likewise relied wholly on state cases for the principle that a defendant who is not told about the direct consequences of his plea "may withdraw the plea and be returned to his or her uncertain status before the negotiated bargain." (State App. at 2a). Accordingly, the Court of Appeals decision is devoid of any reliance on federal constitutional authority for its determination, and rests on its own interpretation of state law and the due process clause of the State Constitution.

Further, respondent's case suffered from Catu error — the trial court's failure to advise respondent about post-release supervision in the course of his pleading guilty, thus violating People v. Catu, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005). In Catu, the New York Court of

Appeals held that, "[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction." Id. at 245. As the State notes, the New York Court of Appeals relied "extensively" on Catu and its progeny. (State Pet. at 16). However, Catu itself relied only on state law — People v. Ford, 86 N.Y.2d 397 (1995) — and included no federal caselaw or federal constitutional citations in so doing. See Catu, 4 N.Y.2d at 244-45.

Accordingly, this is not a case where the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law. . . ." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). This Court cannot conclude that "the state court decided the case the way it did because it believed that federal law required it to," id. at 1041, and must therefore deny the State's petition for lack of jurisdiction.

II. THE ALLEGED ERROR WILL AFFECT FEW, IF ANY, CASES BEYOND RESPONDENT'S.

Even if not barred by adequate and independent state law grounds, the facts of respondent's case are sufficiently unusual that any ruling from this Court would affect few people, making the case a poor choice for review by this Court. The State makes no claim in their petition that the alleged error — prohibiting the lower court from engaging in what they term "specific performance" of the bargain struck with respondent — has occurred with any frequency, or will have widespread effect. To the contrary, the State maintains that the modified sentence benefitted respondent by granting him a "windfall" (State Pet. at 8), and previously

endorsed the view that any "reasonable defendant" would prefer the modified sentence for that reason (State's Brief in the New York Court of Appeals at 22). By the State's own lights, respondent is a rare defendant, as most defendants would never have insisted on plea vacatur over a beneficial sentence modification.

The scenario here is thus a unique one, confined to New York State, not likely to be repeated even there, and making any ruling by this Court exceedingly narrow in its reach.

In People v. Catu, 4 N.Y.3d 242, 245, 792 N.Y.S.2d 887 (2005), the New York Court of Appeals held that postrelease supervision is a direct consequence of pleading guilty, and that a court's failure to inform a pleading defendant about this component of his sentence renders the plea unknowing and involuntary and requires reversal. In People v. Van Deusen, 7 N.Y.3d 744, 745-46, 819 N.Y.S.2d 854 (2006), the Court of Appeals held that plea vacatur was required where the trial court failed to advise the defendant about postrelease supervision, and, over defendant's subsequent motion to withdraw her plea, imposed a sentence including postrelease supervison that was within the bargained-for range of imprisonment. The case was "indistinguishable" from Catu insofar as the plea was not knowing, voluntary and intelligent. Id. In People v. Louree, 8 N.Y.3d 541, 545-46, 838 N.Y.S.2d 18 (2007), the Court of Appeals held that a defendant may challenge the sufficiency of the plea allocution on Catu grounds on direct appeal, notwithstanding his or her failure to preserve the issue for appellate review by means of a postallocution motion, and that a collateral motion will not lie. In summarizing the applicable rules, the Court of Appeals stated that "it is irrelevant that the prison sentence added to postrelease supervision is within the range of prison time promised at the allocution." Id. at 545. And in respondent's case, the Court of Appeals held that the trial court could not remedy

respondent's involuntary plea by modifying his sentence to equal the original sentencing promise. (See State App. at 4a-5a).

The decisions in Catu and its progeny are now well-known and understood by the lower courts. The Court of Appeals has fashioned rules for the lower courts to follow in this area, and has made the consequences of failing to follow them abundantly clear. Unquestionably, the number of defendants not informed about post-release supervision when pleading guilty will dwindle down to none or next-to-none within a relatively short period of time. There will be no occasion for trial courts to impose a remedy, or for the State to fret about the appropriate one, for there will be no defect to remedy.[1] Further, by making direct appeal the sole vehicle for raising such claims, the Court of Appeals has imposed strict limitations on a defendant's ability to bring a Catu claim. Under Louree, a defendant who fails to bring his Catu claim on his direct appeal may not do so later via collateral motion. Convictions will not be undone years after the fact, reducing potential obstacles to retrial. Because the number of defendants who will seek relief on Catu

---

[1] The State has offered no figures on the number of convictions reversed on Catu grounds, but, from a survey of the appellate reversals, it would not appear overwhelming. Six defendants had their convictions reversed on Catu grounds in 2005, see People v. Catu, 4 N.Y.3d 242 (2005); People v. Bracey, 24 A.D.3d 363, 807 N.Y.S.2d 34 (1st Dept. 2005); People v. Tomasula, 24 A.D.3d 159, 805 N.Y.S.2d 339 (1st Dept. 2005); People v. Goodwill, 20 A.D.3d 931, 797 N.Y.S.2d 345 (4th Dept. 2005); People v. Cintron, 18 A.D.3d 322, 795 N.Y.S.2d 531 (1st Dept. 2005); People v. Feehan, 18 A.D.3d 279, 796 N.Y.S.2d 42 (1st Dept. 2005); six defendants had their convictions reversed in 2006, see People v. Van Deusen, 7 N.Y.3d 744 (2006); People v. Krug, 34 A.D.3d 1119, 824 N.Y.S.2d 499 (3rd Dept. 2006); People v. Armstrong, 31 A.D.3d 291, 820 N.Y.S. 210 (1st Dept. 2006); People v. Simpson, 30 A.D.3d 1112, 815 N.Y.S.2d 847 (4th Dept. 2006); People v. Evans, 30 A.D.3d 1130, 816 N.Y.S.2d 446 (1st Dept. 2006); People v. Weekes, 28 A.D.3d 499, 813 N.Y.S.2d 188 (2d Dept. 2006); six defendants had their convictions reversed in 2007, see People v. Hill, 9 N.Y.3d 189 (2007); People v. Louree, 8 N.Y.3d 541 (2007); People v. Woods, 46 A.D.3d 345, 847 N.Y.S.2d 552 (1st Dept. 2007); People v Pagan, 43 A.D.3d 1086, 843 N.Y.S.2d 101 (2d Dept. 2007); People v. Minter, 42 A.D.3d 914, 838 N.Y.S.2d 764 (4th Dept. 2007); People v.Yanas, 36 A.D.3d 1149, 828 N.Y.S.2d 663 (3rd Dept. 2007); and three defendants' convictions were reversed in the first three months of 2008, see People v. Cook, __ N.Y.S.2d __, 2008 WL 740345 (2d Dept. 2008); People v. O'Keefe, 48 A.D.3d 1265, 849 N.Y.S.2d 918 (4th Dept. 2008); People v. Thompson, 47 A.D.3d 648, 848 N.Y.S.2d 540 (2d Dept. 2008).

grounds will grow only smaller as time passes, the question of whether specific performance is an appropriate remedy will soon become academic and does not warrant this Court's attention.

Indeed, the class of cases for which the question of remedy will ever be an issue is even smaller. Since, as the State has urged in its petition, the defendant may generally be seen as benefitting when offered the chance of a new bargain that reduces the incarceratory portion of a sentence to offset the addition of a period of post-release supervision (State Pet. at 8), specific performance may well be the agreed-upon by the parties in lieu of plea vacatur. Only if the defendant, like respondent, wants plea vacatur notwithstanding any proposed sentence modification does the rule requiring reversal become relevant. The State itself cites only one other case — Van Deusen — where the Court of Appeals allegedly vacated a guilty plea "on the same erroneous ground" (State Pet. at 17, n. 17) — though their citation of Van Deusen is puzzling since the State previously argued that Van Deusen's facts were "strikingly different" than the facts in respondent's case, and that the Court of Appeals committed no error in vacating the plea (See State's Brief in the Court of Appeals at 28-30).

Accordingly, the limited number of cases that will present Catu error in the near future, and the even tinier number in which the Court of Appeals' rule in respondent's case would even operate, mandate denial of the State's petition.

III. THERE IS NO CONFLICT BETWEEN RESPONDENT'S CASE AND SANTOBELLO.

Even if this Court had the power to review the ruling in respondent's case, the Court of Appeals' holding requiring plea vacatur to remedy Catu errors presents no violation of federal constitutional law. Contrary to petitioner's claim, respondent's case is not inconsistent with

Santobello v. New York, 404 U.S. 257 (1971). The two cases present distinct violations that are remedied in different ways.

Santobello concerned a specific kind of plea breach — when the government breaks a promise that had induced the defendant to plead guilty. In Santobello, the defendant pleaded guilty to a lesser included offense in return for the prosecutor's agreement to make no recommendation as to sentence. At the sentencing hearing six months later, a different prosecutor from the same office recommended the maximum sentence. Id. at 259. There was no question in Santobello regarding the defendant's understanding of his plea agreement; the defendant's claim for relief stemmed solely from the prosecutor's broken promise. Id. at 262; see also id. at 268 (Douglas, J., concurring). The federal constitutional rule of Santobello requires that a promise by the prosecutor be honored as a matter of due process. As this Court stated: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. This Court in Santobello did not hold that failure by the government to fulfill a plea-inducing promise renders a plea involuntary or unknowing.[2] The due process violation occasioned by a Catu violation is of a different type. It does not concern a prosecutor's broken promise, but the court's failure to "ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences."

See Catu, 4 N.Y.2d at 244-45. Catu error renders the defendant's plea involuntary. Id. at 245.

---

[2] Justice Marshall's dissent in Santobello further reinforces that Santobello claims are distinct from involuntariness claims. Justice Marshall urged that a Santobello claim undercuts the defendant's waiver of constitutional rights, thus compelling plea withdrawal, 404 U.S. at 268. The majority rejected this theory, holding instead that a promise by the prosecutor upon which the defendant relies "must be fulfilled." 404 U.S. at 262.

The Court of Appeals' holding that respondent's involuntary plea must be set aside thus does not conflict with Santobello, because the two cases implicate different defects that allow for different remedies. Where a defendant possesses full information upon pleading guilty but the promise to him is later broken, the plea might be remedied by either specific performance or plea vacatur, as Santobello said and as the New York Court of Appeals acknowledged in respondent's case. See Santobello, 404 U.S. at 262-63 (remanding to state court for determination of remedy); State App. at 3a, n.1 ("When, at the time of a plea, a defendant possesses the requisite information to make an informed choice, the defendant's guilty plea is voluntary, so either the plea's vacatur or specific performance of the promise is appropriate.") But respondent's case is not a broken-promise case. Respondent, rather, did not have full information when he pleaded guilty, because he was never advised about postrelease supervision. Accordingly, as the Court of Appeals stated, "vacatur [is] the appropriate remedy." (State App. at 3a, n1). That the information respondent lacked when he pleaded guilty happened to concern a sentencing component does not change the nature of the plea's fundamental defect or convert it to a broken-promise case remediable by specific performance.

In distinguishing pleas that fail because they are involuntarily entered from those that falter because of a broken promise, the New York Court of Appeals did nothing new or controversial. In Chaipis v. State Liq. Auth, 44 N.Y.2d 57, 64, 404 N.Y.S.2d 76 (1978), the Court of Appeals court described Santobello as a "corollary of the prohibition on coerced guilty pleas," and explicitly stated that "if a prosecutor makes a representation within the scope of his power, and defendant acts in reliance upon the representation, defendant may be entitled to have the representation enforced, at least where merely vacating the plea would result in significant

prejudice to defendant (see People v. Selikoff, 35 N.Y.2d 227, cert. den 419 U.S. 1122)." The Court of Appeals distinguished this situation from unknowing pleas, declaring it a "truism" that a guilty plea "must be taken only when the defendant has knowledge and understanding of the consequences of the plea," and that "[i]f the plea be coerced, or if defendant's knowledge of its consequences not be explored sufficiently, the plea may be subject to vacation on proper and timely motion. Id. at 63-64.

The remedy ordered by the New York Court of Appeals in respondent's case, as well as in its prior cases, comports with this settled distinction and thus with Santobello. Compare People v. Gina M. M., 40 N.Y.2d 595, 597, 388 N.Y.S.2d 899 (1976)(reversing conviction and vacating plea where defendant was "inadequately, if not incorrectly, advised of the plea consequences") with People v. Torres, 45 N.Y.2d 751, 408 N.Y.S.2d 487 (1978)(where defendant's guilty plea was voluntary but the court failed to fulfill the promise to allow him to withdraw the plea should the court refuse or fail to adjudicate him youthful offender, Court of Appeals remanded for either resentencing or plea withdrawal); accord McCarthy v. United States, 394 U.S. 459, 469-70 (1969)(where court failed to ascertain on-the-record that the defendant's plea was knowing and voluntary, this Court orders the plea to be set aside, rejecting the Government's request that the case be remanded for an evidentiary hearing on the issue of voluntariness. "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.").

This Court has no supervisory power over state judicial proceedings, and may intervene only to correct wrongs of constitutional dimension. See Smith v. Phillips, 455 U.S. 209, 221 (1982); Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2679 (2006). No such wrong occurred here,

where the New York Court of Appeals correctly held that the lower court's failure to advise respondent of post-release supervision rendered his plea involuntary rather than simply upsetting his sentencing expectations. See State App. at 5a. Respondent's case and Santobello are not inconsistent for the simple reason that Santobello applies to a different situation entirely. The New York Court of Appeals correctly, and in violation of no federal constitutional rule, ordered vacatur of respondent's involuntary plea. The State is aggrieved by that fact, but that is not a reason for this Court to grant the State's Petition for Writ of Certiorari.

Finally, even if Santobello did apply to respondent's case, the New York Court of Appeals did not breach any constitutional precedent in ordering plea vacatur here. In Santobello, this Court said: "[T]he interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration." 404 U.S. at 262-63. This Court continued that the "ultimate relief" was best left to the "discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, . . . or whether in the view of the state court, the circumstances require granting the relief sought by the petitioner, i.e., the opportunity to withdraw his plea of guilty." Id. at 263.

The State incorrectly casts this Court's statement regarding choice-of-remedy as "constitutional" precedent. (See State Pet. at 17). But this Court did not hold that the Federal Constitution mandated specific performance or compelled a court to consider both specific performance and plea vacatur. While due process requires the promise to be honored, this Court left it to the state courts to decide what would best do so. Therefore, even if Santobello applied,

the New York Court of Appeals violated no federal constitutional rule in deciding that Catu errors compel reversal. The Court of Appeals did nothing more than perform the task assigned to it by this Court, that is, deciding that in the particular circumstances of a Catu violation, the appropriate remedy for the state courts to implement is plea vacatur.

IV. FEDERAL CASELAW APPLYING HARMLESS ERROR PURSUANT TO FED.R.CRIM. PRO. 11(H) IS IRRELEVANT.

Petitioner urges this Court to grant certiorari on the ground that "the decision of the New York Court of Appeals conflicts with the holdings of virtually every federal appellate court to address the issue." (State Pet. at 9). These courts, petitioner states, have "found harmless the failure to inform a defendant about a term of supervised release (the federal analog to PRS), so long as the combined prison sentence and supervised release term do not exceed the total amount of time that the defendant knew he could spend in prison." (State Pet. at 9-10).

The conflict petitioner perceives between these federal courts and the New York Court of Appeals provides no reason for granting certiorari, for every one of the cases petitioner relies upon was decided under Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(c) requires the district court to determine that the defendant understands the maximum possible penalty provided by law, including the effect of any special parole or supervised release term. Rule 11(h) expressly provides for the application of harmless error analysis, providing that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Therefore, the conflict that petitioner identifies between federal law and the New York Court of Appeals on the issue of harmless error is irrelevant, for while this Court has plenary jurisdiction over federal courts of appeals, including supervisory power, it has "no

supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Smith v. Phillips, 455 U.S. 209, 221 (1982); cf. Dickerson v. Minnesota, 530 U.S. 428, 437 (2000)("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."). A conflict between the federal courts' application of the federal rules of criminal procedure and the New York Court of Appeals' application of the harmless doctrine presents no "wrong of constitutional dimension" and provides no basis for a granting of certiorari.[3]

[3] It is worth noting that under Rule 11(h), if the combined sentence of incarceration and supervised release exceeds the maximum term the defendant was told he could receive, the error is not harmless and the defendant's plea must be vacated. Any potential extension of the period of supervised release must be taken into account and must not exceed the maximum of which the defendant is advised. See United States v. Fuentes-Mendoza, 56 F.3d 1113 (9th Cir. 1995). Respondent was promised a sentence of 15 years, but, as the New York Court of Appeals noted, see State App. at 5a, n.2, and as petitioner does not dispute, see State Pet. at 13, the combined sentence of incarceration and post-release supervision could potentially exceed 15 years by six months. Accordingly, even if Rule 11(h) of the federal rules applied, the error of failing to advise respondent about postrelease supervision would not be harmless and would require vacatur of respondent's plea.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT S. DEAN*
BARBARA ZOLOT
Counsel for Respondent
Center for Appellate Litigation
74 Trinity Place - 11th floor
New York, NY 10006

*Counsel of Record for Respondent
April 11, 2008

91

(3)

No. 07-1043

FILED
APR 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

ANTHONY HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County

MARK RYAN DWYER
DAVID M. COHN*
Assistant District Attorneys

New York County
District Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9000

* *Counsel of Record for the Petitioner*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

ARGUMENT.....1

CONCLUSION.....8

TABLE OF AUTHORITIES

FEDERAL CASES

Blackledge v. Allison, 431 U.S. 63 (1977) 6

Corbitt v. New Jersey, 439 U.S. 212 (1978) 6

Duke v. Cockrell, 292 F.3d 414 (5th Cir. 2002) 5

Michigan v. Long, 463 U.S. 1032 (1983) 3

Parry v. Rosemeyer, 64 F.3d 110 (3d Cir. 1995) 6

Pennsylvania v. Labron, 518 U.S. 938 (1996) 3

Sanchez v. United States, 572 F.2d 210 (9th Cir. 1977) 6

Santobello v. New York, 404 U.S. 257 (1971) 1, 3-4, 6, 8

Warren v. Richland County Circuit Court, 223 F.3d 454 (7th Cir. 2000) 5

STATE CASES

Cooper v. Morin, 49 N.Y.2d 69, 424 N.Y.S.2d 168 (1979) 2-3

People v. Van Deusen, 7 N.Y.3d 744, 819 N.Y.S.2d 854 (2006) 7

FEDERAL RULES

Fed. Rule Crim. Proc. 11(h) 5

07-1043

In The
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-versus-

ANTHONY HILL,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

The State of New York submits this reply brief in support of its petition for a writ of *certiorari*.

ARGUMENT

In his brief opposing *certiorari*, respondent asserts that this case does not present a federal question, that it is distinguishable from *Santobello v. New York*, 404 U.S. 257 (1971), and that it is distinguishable from the numerous federal circuit court decisions addressing the same questions at issue here. All of those arguments are unavailing.

To begin, as discussed on pages 15-17 of the State's *certiorari* petition, the decision of the New York Court of Appeals presents a federal question. The Court of Appeals termed the error a

"constitutional" defect and cited a precedent of this Court. In addition, the Court of Appeals cited state cases that turned on federal constitutional principles. Significantly, the New York courts have long intertwined federal and state constitutional law when evaluating the validity of plea bargains.

Respondent argues, citing *Cooper v. Morin*, 49 N.Y.2d 69, 424 N.Y.S.2d 168 (1979), that New York courts sometimes interpret due process rights more broadly under the state constitution than under the federal constitution. (*See* Opposition Brief: 3).[1] Respondent's reliance on *Cooper* is misplaced, for two reasons. First, *Cooper* did not discuss plea bargaining; it involved a class action lawsuit by pretrial detainees challenging a county jail's visitation policies and disciplinary rules. *Cooper* thus concerned matters far different from those at issue here.

Second, and more fundamentally, *Cooper* made a clear distinction between the state and federal due process protections afforded pretrial detainees. The court in *Cooper* discussed federal precedents at length and rejected the plaintiffs' federal due process claims. *See Cooper*, 49 N.Y.2d at 76-78, 424 N.Y.S.2d at 172-74. The court then separately addressed state constitutional precedents and held that the plaintiffs were entitled to some

---

[1] Parenthetical references designated as "Petition" and "Opposition Brief" are to the State's petition for a writ of *certiorari*, and to respondent's brief in opposition, respectively.

relief under state law. The court expressly ruled that the state constitution afforded pretrial detainees greater protection than the federal constitution. *See Cooper*, 49 N.Y.2d at 78-82, 424 N.Y.S.2d at 174-77.

Here, in contrast, the Court of Appeals made no "plain statement" that respondent's challenge to his guilty plea would be evaluated differently under state and federal constitutional law. Instead, the court intermingled federal and state precedents -- again, as the New York courts have long done when applying the Due Process Clause to plea bargaining. This Court must presume, therefore, that the decision of the Court of Appeals rests on federal due process grounds. *See Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Next, respondent's attempt to distinguish this case from *Santobello* fails. (*See* Opposition Brief: 8-13). Respondent merely repeats the erroneous conclusion of the Court of Appeals: that the failure to inform a defendant about post-release supervision (PRS) is a "fundamental defect" that cannot be remedied by specific performance. (Opposition Brief: 10). While respondent concedes that a "broken promise" can be remedied by specific performance, he asserts that there was no "broken promise" here. (*Id.*).

Respondent is wrong; a "broken promise" was the essence of this case. When he pleaded guilty, respondent was promised a prison sentence of 15

years, with no mention of PRS. He received, however, a sentence of 15 years in prison and 5 years of PRS. The promise of a 15-year "flat" sentence was therefore unfulfilled. The trial court remedied that error by resentencing respondent to 12 ½ years in prison and 2 ½ years of PRS, to fulfill his reasonable expectations under the bargain. Hence, like *Santobello*, this case involved a broken sentencing promise, which could be remedied by specific performance. (*See* Petition: 6-9)

Respondent notes that *Santobello* granted the state court discretion to choose the appropriate remedy: that is, to determine whether the circumstances warranted vacatur of the plea or specific performance. (*See* Opposition Brief: 12-13). But as explained on pages 8-9 of the *certiorari* petition, the Court of Appeals did not exercise that discretion here. Instead, the Court of Appeals held that the constitution *required* vacating respondent's plea. As discussed, that conclusion was incorrect. This Court should remand the case to the Court of Appeals so that it may exercise its discretion with full knowledge of the options.

Respondent's attempt to distinguish the federal circuit court decisions on point also fails. (*See* Opposition Brief: 13-15). As respondent does not dispute, federal circuit courts have held, uniformly, that the failure to advise a defendant of supervised release (the federal analog to PRS) is harmless, so long as the total sentence ultimately imposed (prison plus supervised release) does not

exceed the maximum prison term that the defendant was warned he could receive. (*See* Petition: 9-14).

Respondent does not deny that the New York Court of Appeals diverged from the holdings of every federal appellate case on point. He argues, however, that this split has no constitutional significance, because Rule 11(h) of the Federal Rules of Criminal Procedure permits harmless error review. (Opposition Brief: 13-15). This argument makes no sense. As discussed, the New York Court of Appeals held here that the constitution *forbids* harmless error review and *requires* vacatur of the plea. On the other hand, federal courts have discerned no constitutional problem with applying the harmless error doctrine to the same situation. The New York and federal courts are thus split over whether harmless error review is constitutionally permissible.[2]

---

[2] Respondent also incorrectly asserts that the error at the plea colloquy here was not harmless. Respondent notes that he could receive an extra six months in jail if he were to violate his PRS near the end of his term of supervision. He argues, therefore, that he could spend more time in state custody than the promised 15 years. (*See* Opposition Brief: 15 n. 3). However, as explained on page 14 of the *certiorari* petition, it is irrelevant that respondent might serve additional jail time for a violation of his PRS. Any sentence that respondent might receive for violating his PRS would not be a direct consequence of his guilty plea. Instead, it would be punishment for an independent, voluntary act: respondent's willful violation of the terms of his release. *See, e.g., Duke v. Cockrell, 292 F.3d 414, 417* (5th Cir. 2002); *Warren v. Richland*

(Continued...)

Finally, contrary to respondent's assertion (Opposition Brief 5-8), this case is vitally important. As this Court has observed, plea bargaining is essential to the criminal justice system. *See Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system") (*quoting Blackledge v. Allison*, 431 U.S. 63, 71 (1977)); *Santobello*, 404 U.S. at 261 ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part").

A system that depends upon guilty pleas also depends upon the presumption that voluntary plea agreements will be enforced. If defendants can escape from agreed-upon sentences, prosecutors will have little incentive to make plea offers. The case at hand provides a perfect example. The State granted respondent a mid-trial plea bargain, after the victim (respondent's daughter) testified that respondent had raped and abused her over a period of six years. The State offered the bargain with the expectation that respondent would serve 15 years in prison and that the victim would not be forced to testify again.

(...Continued)

County Circuit Court, 223 F.3d 454, 457-58 (7th Cir. 2000); *Parry v. Rosemeyer*, 64 F.3d 110, 114 (3d Cir. 1995); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977). The sentence that respondent received as a result of his guilty plea -- 12 ½ years in prison and 2 ½ years of PRS -- comported with the plea agreement and in fact was less restrictive than the promised 15-year prison term. He thus received the benefit of his bargain.

In return, respondent avoided the prospect of an even lengthier sentence after trial. Notably, in accepting the bargain, respondent freely admitted his guilt.

Nevertheless, the Court of Appeals held that the State must retry respondent -- and force the victim to testify again -- even though the trial court ultimately imposed a less restrictive sentence than the one promised. This is theater of the absurd. The State would never have agreed to a mid-trial plea if it had any inkling that such a result could occur. Moreover, as a result of the decision of the Court of Appeals, even an inconsequential error in informing a defendant about the sentence will now never be harmless in New York State. This cannot be what "due process" requires.[3]

In sum, the New York Court of Appeals ignored the longstanding rule of, ironically,

---

[3] As noted in the *certiorari* petition, the New York Court of Appeals vacated a guilty plea on the same erroneous ground in another recent case. *See People v. Van Deusen*, 7 N.Y.3d 744, 745-46, 819 N.Y.S.2d 854, 854-55 (2006). Contrary to respondent's contention (*see* Opposition Brief: 8), the State argued below that the decision in *Van Deusen* contradicted the holdings of every federal appellate case on point. (*See* State's Court of Appeals Brief: 29 n. 5). Of course, the State also attempted to distinguish *Van Deusen* from the present case, realizing that the Court of Appeals was unlikely to overrule its recent precedent. (*See id.*: 27-30). The critical issue here is that, in this entire line of decisions, the New York Court of Appeals ignored settled constitutional principles. This Court should correct that error before it spreads further.

Santobello v. New York. This Court should grant *certiorari* to correct that error and to resolve the split between the New York and federal courts. In addition, a reversal here would safeguard the plea bargaining system, which relies on the enforcement of voluntary bargains. Indeed, summary reversal would be appropriate, because the error was clear and there are no colorable arguments for affirmance.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

MARK RYAN DWYER
DAVID M. COHN*
Assistant District Attorneys
Of Counsel

*Counsel of Record for Petitioner

April 23, 2008